THE ETHICS OF SUPREME COURT DECISIONS ON CIVIL RIGHTS FROM 1954 - 1968

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PREFACE

This study focuses on the significant Supreme Court cases from 1954 to 1968 which involved Black people. The writer will examine the actions of the court during this critical period to see if this commonly called liberal court has taken the Constitutionally ethically available options necessary to correct past actions of unjust cruelties upon a race of people who were once regarded as a people whose rights no White man had to obey.

This paper could not have been written without the patience, guidence and assistance of Professor George B. Thomas, Associate Professor of Church and Society and Dr. Jonathan Jackson, Associate Professor of Christian Education at the Interdenominational Theological Center.

CHAPTER I

INTRODUCTION

In a speech to a group of students at the Jewish Theological Seminary on November 11, 1962, Former Chief Justice Earl Warren made a stoic indictment against the social ethics in American society. Quite emphatically he said "law in civilized life floats in a sea of ethics. It is indispensable to civilization."[1] If a society existed without law then the people within this mythical society would be at the mercy of the least scrupulous; without ethics law could not exist. Chief Justice Warren saw the need for law and ethics to complement each other if the American society can hope to grow into a more just society for all of its citizens. Law and ethics are terms in American society which must be viewed in the light of the pluralistic nature of the American citizenry.[2]

The founding fathers of the United States of America wrote the document called the United States Constitution. Professor Charles

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[1] Earl Warren, "Ethics and the Law", Social Progress (Crawfordvilles, Indiana; Office of Church and Society of the Board of Christian Education of the United Presbyterian Church in the United States of America June 1963) p. 5

[2] Ibid pp. 5-14

BEARD CONTENDED IN HIS BOOK, THE SUPREME COURT AND THE CONSTITUTION,[3] THAT THE CONSTITUTION WAS DESIGNED BY PROPERTY HOLDING CONSERVATIVES. THESE MEN INTENDED TO PROVIDE A GOVERNMENTAL SYSTEM FAVORABLE TO THEIR INTERESTS AND THEIR UNDERSTANDING OF WHAT CONSTITUTES THE GOOD SOCIETY. THE BLACKMAN WAS ASSIGNED TO AN INFERIOR POSITION IN THIS GREAT DOCUMENT. HE WAS GIVEN THE STATUS OF BEING THREE-FIFTHS OF A MAN IN APPORTIONING REPRESENTATIVES TO CONGRESS. UNTIL THE PASSAGE OF THE 13TH AMENDMENT, THE BLACKMAN WAS REGARDED AS MERE PROPERTY.[4] THE FRAMERS OF THE CIVIL WAR AMENDMENTS WANTED TO GIVE THE BLACKMAN EQUAL STATUS BEFORE THE LAW, THE SAME STATUS AS WAS GIVEN TO THE WHITE MAN BY LAW, CUSTOM AND TRADITION.

HOWEVER, THE SUPREME COURT IN VARIOUS DECISIONS AFTER THE CIVIL WAR SYSTEMATICALLY EMASCULATED THIS GREAT PURPOSE. THE COURT DESIGNED A DUAL CITIZENSHIP SYSTEM AS A TACTICAL DEVICE IN ORDER TO KEEP THE BLACKMAN IN A QUASI-SLAVERY SYSTEM. IN UNITED STATES V CRUIKSHANK[5], THE SUPREME COURT SAID THAT PROTECTION OF CIVIL RIGHTS WAS ORIGINALLY ASSUMED BY THE STATES AND IT STILL HAD THAT AUTHORITY. IN 1883, THE COURT SAID IN UNITED STATES V HARRIS,[6] THAT THE EQUAL PROTECTION OF THE LAW CLAUSE OF THE FOURTEENTH AMENDMENT MEANT ONLY THAT THE STATES

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[3] CHARLES BEARD, THE SUPREME COURT AND THE CONSTITUTION (ENGLEWOOD CLIFFS: PRENTICE-HALL, INC., 1963)

[4] SEE ALBERT BLANSTEIN, DISCRIMINATION AND THE LAW (CHICAGO: UNIVERSITY OF CHICAGO PRESS, 1965)

[5] 92 U. S. 542 (1875)

[6] 106 U. S. 629 (1883)

COULD NOT AFFIRM RACIAL BARRIERS ON BLACKS AND THAT CONGRESS HAD NO AUTHORITY TO PROTECT THE FREEDMEN FROM STATE INACTION AND INABILITY TO PROTECT THEIR RIGHTS.[7] IN ANOTHER CASE DECIDED IN 1883, THE SUPREME COURT SAID THAT CONGRESS HAD NO AUTHORITY TO ENACT THE PUBLIC ACCOMMODATION SECTION OF THE CIVIL RIGHTS ACT OF 1875. THE COURT ESTABLISHED THE RULE OF LAW THAT THE STATE HAD NO JURISDICTION IN MATTERS REGARDING INDIVIDUAL INVASION OF ANOTHERS CIVIL RIGHTS.[8] THE NEXT CASE TO BE CONSIDERED WAS PLESSY V FERGUSON CASE.[9] THE COURT SAID THAT THE STATES HAD A RIGHT TO CLASSIFY NEGROES ON THE BASIS OF RACE, AND COULD DENY THEM ACCESS TO CERTAIN PUBLIC FACILITIES WERE PROVIDED FOR BOTH RACES.[10]

SINCE 1896, THE SUPREME COURT HAS MADE SOME EFFORT TO BRIDGE THE GAP BETWEEN THE RIGHTS OF WHITE PEOPLE AND THOSE OF BLACK PEOPLE. THIS EFFORT HAD LARGELY TAKEN PLACE IN THE AREA OF EDUCATION. THE COURT STEADILY CHIPPED AWAY AT ITS SEPARATE BUT EQUAL DOCTRINE UNTIL

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[7] AN EXCELLENT SOURCE BOOK ON THE HISTORY OF THE 14 AMENDMENT IS JACOBUS TEN BROOK'S, EQUAL UNDER LAW (NEW YORK: COLLIER BOOKS, 1951)

[8] CIVIL RIGHTS CASES 109 U. S. 3 (1883)

[9] 163 U. S. 537 (1896)

[10] THIS CASE ONLY DEALT WITH DISCRIMINATION IN RAILROAD TRAVEL, BUT SEPARATE BUT EQUAL DICTUM IN THIS CASE WAS USED TO LEGALLY SEPARATE BLACKS AND WHITES IN OTHER AREA OF LIFE.

AN EXCELLENT REFERENCE TO SHOW THE EXTENT THAT THIS CASE HAD SPREAD INTO AMERICAN LIFE STYLE COULD BE SEEN IN PAULI MURRAY'S BOOK STATES' LAW ON RACE AND COLOR. WOMEN'S DIVISION OF METHODIST CHURCH, 1951.

THE BROWN V BOARD OF EDUCATION OF TOPEKA[11] CASE. IN THE MOMENTOUS DECISION, THE COURT CONCLUDED THAT THE SEPARATE BUT EQUAL DOCTRINE WAS NO LONGER VALID IN THE FIELD OF EDUCATION.[12] UNDER CHIEF JUSTICE EARL WARREN, THIS COURT TOOK A GIANT STEP TOWARD UNDOING SOME OF THE DAMAGE DONE BY THE COURT IN THE PLESSY V FERGUSON[13] CASE. YET, THIS COURT HAS HAD SEVERAL OPPORTUNITIES TO ERADICATE VARIOUS VESTIGES OF RACISM IN AMERICAN LIFE. THE ACTIONS OF THE STATE IN ITS APPLICATION AND INTERPRETATION OF THE CONSTITUTION HAS HELPED TO PERPETUATE A QUASI SLAVERY SYSTEM LONG AFTER THE PASSAGE OF THE 13TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

IN THIS STUDY, THIS WRITER WILL CONSIDER SIGNIFICANT CASES DECIDED BY THE CHIEF JUSTICE EARL WARREN COURT BETWEEN 1954-1968. IN THIS PERIOD THE KEY SIT-IN CASES WERE DECIDED AND THE SUPREME COURT HAD NUMEROUS OPPORTUNITIES TO DISPEL THE RACIST CONSTITUTIONAL CASES RULED AFTER THE CIVIL WAR. IN 1954 THE FAMOUS BROWN V BOARD OF EDUCATION OF TOPEKA[14] DECISION WAS RENDERED BY DESTROYING FOREVER THE PLESSY V FERGUSON[15] RACIST DECISION. YET IN 1964, TEN YEARS LATER LITTLE PROGRESS HAD BEEN MADE IN PROVIDING EQUAL OPPORTUNITIES

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[11] 347 U. S. 483 (1954)

[12] SEE JOHN MCCORD ED. WITH ALL DELIBERATE SPEED CHICAGO: UNIVERSITY OF ILLINOIS PRESS, 1969

[13] 163 U. S. 537 (1896)

[14] 347 U. S. 483 (1954)

[15] 163 U. S. 537 (1896)

IN THE FIELD OF EDUCATION. THE NEW YORK TIMES REPORTED ON MAY 18, 1964 THAT 54.8 PER CENT OF BLACK CHILDREN IN THE SOUTH AND BORDER STATES WERE ATTENDING DESEGREGATED SCHOOLS. IN THE SOUTHERN STATES ONLY 1.18 PER CENT OF THE BLACK CHILDREN WERE ATTENDING DESEGREGATED SCHOOLS.[16] THIS WRITER WILL VIEW THE ACTIONS OF THE COURT FROM A BLACK ETHICAL PERSPECTIVE. SINCE LAW AND ETHICS ARE ESSENTIAL COMPONENTS OF A JUST SOCIETY, THIS WRITER WILL EXAMINE THE ACTIONS OF THE COURT DURING THIS CRITICAL PERIOD TO SEE IF THIS COMMONLY CALLED LIBERAL COURT HAS TAKEN THE CONSTITUTIONALLY ETHICALLY AVAILABLE OPTIONS TO CORRECT PAST ACTIONS OF UNJUST CRUELTIES UPON A RACE OF PEOPLE WHO WERE ONCE REGARDED AS A PEOPLE WHOSE RIGHTS NO WHITE MAN HAD TO OBEY.

LAWS ARE MADE BY MEN. THE UNITED STATES CONSTITUTION WAS WRITTEN BY PROPERTY HOLDING CONSERVATIVES BUT THE CIVIL RIGHTS AMENDMENTS WERE ADDED TO THE CONSTITUTION IN ORDER TO GIVE BLACK PEOPLE THE SAME RIGHTS AS WHITE PEOPLE. THE USE OF POWER IN RELATIONSHIP TO LAW DETERMINES THE JUSTICE, OR INJUSTICE WHICH MAY OCCUR. LAW IS SUPPOSED TO BE THE RESTRAINT OF POWER. WHEN A GOVERNMENT HAS POWER SAFEGUARDED BY LAW, IT CAN BE TRUTHFULLY SAID THAT ONLY THOSE WITH WHOM THE POWER FIGURES CHOOSE TO IDENTIFY WITH CAN BE BENEFITED. THOSE WHO ARE NOT ACCEPTED AS PART OF THE "IN CROWD" ARE DISOWNED AND REJECTED. AN EXAMPLE OF SUCH A GOVERNMENT CAN BE RECOGNIZED IN THE

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[16] KESSING'S RESEARCH REPORT RACE RELATIONS IN THE U. S. A. 1954 - 68 (NEW YORK: CHARLES SCRIBNER'S SONS, 1970) P. 88

STATEMENT "THE FATHER OF A SLAVE RULED BY A KENTUCKY COURT IS UNKNOWN TO OUR LAW."[17] THE STRUCTURE OF POWER PROTECTED BY LAW CAN DO WHAT IT LIKES. POWER, IN THIS REFERENCE IS USED TO DESTROY THE FAMILY UNITY OF BLACK PEOPLE. THE LAW IS THE SAFEGUARD OF THE PREJUDICES OF THE ONE EXERCISING POWER. DURING THE SLAVERY PERIOD IN AMERICA THE WHITE SLAVE OWNERS UTILIZED THE POWER OF THE STATE TO SUBSTAIN THE INSTITUTION OF SLAVERY.

THIS WRITER PURPORTS IN THIS DISCOURSE TO SHOW THAT THE WARREN COURT DURING THIS PERIOD DID NOT FULLY EXERCISE ITS JUDICIAL POWER TO CORRECT THE VESTIGES OF INSTITUTIONAL RACISM IN THE REALM OF LAW. THE SUPREME COURT HAD OPPORTUNITIES TO USE THE STATE ACTION DOCTRINE TO STRIKE SIGNIFICANT BLOWS FOR JUSTICE AND EQUALITY IN AMERICAN LIFE FOR ALL CITIZENS.

IN ORDER TO ACHIEVE THE FOREMENTION PURPOSES, IT WILL BE NECESSARY TO DO A CONTENT ANALYTICAL STUDY OF THE SIGNIFICANT DECISIONS OF THE SUPREME COURT INVOLVING BLACK PEOPLE FROM THE 1964 TERM TO THE 1968 TERM. IN ANALYZING THE VOTING PATTERNS AND DECISIONS OF THE JUSTICES A CRITERIA OF SELECTED QUESTIONS WERE USED. THEY WERE AS FOLLOWS: (A) DID THE JUSTICES SUPPORT FULL EQUALITY IN PUBLIC ACCOMMODATIONS FOR ALL AMERICANS? (B) DID THE JUSTICES VOTE REPRESENT AN EFFORT TO BRING ABOUT FULL EQUALITY IN THE PURSUIT OF EDUCATIONAL OPPORTUNITIES? (C) DID THE VOTE OF THE JUSTICE REFECT AN EFFORT TO BRING ABOUT EQUAL REPRESENTATION FOR BLACK PEOPLE?

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[17] LERONE BENNETT BEFORE THE MAYFLOWER (CHICAGO: JOHNSON PUBLICATIONS, 1962) P. 71

(D) IN THE FREE SPEECH CASES DID THE JUSTICE ADVOCATE FREEDOM OF EXPRESSION FOR BLACK PEOPLE IN ORDER TO BE ABLE TO REDRESS GRIEVANCES AGAINST SEGREGATION? (E) IN THE JURY CASES DID THE JUSTICE SUPPORT THE POSITION THAT BLACKS SHOULD NOT BE SYSTEMATICALLY EXCLUDED FROM JURIES? (F) IN THE FAMILY RELATION CASES DID THE JUSTICE ADVOCATE FULL EQUALITY FOR ALL PEOPLE? (G) DID THE JUSTICE SUPPORT THE BLACK MAN'S RIGHT TO BUY AND RENT PROPERTY AS A WHITE PERSON?

THE QUESTIONS HELPED THIS WRITER TO CLASSIFY THE VOTING PATTERNS OF THE JUSTICES IN THE FORTY SIX CASES IN QUESTION. IF THE ANALYSIS OF DICTUM OF THE CASES AND THE ACTUAL VOTES OF THE JUSTICE REFLECTED AN AFFIRMATIVE REPLY TO THE APPROPRIATE QUESTION, THEN, THE JUSTICE'S VOTE WOULD BE PLACED IN THE PRO-BLACK VOTE COLUMN. ON THE OTHER HAND, IF THE JUSTICE RESPONDED NEGATIVELY, THEN HIS VOTES WERE NOTED IN THE NEGATIVE OR ANTI-BLACK CATEGORY. THIS CLASSIFICATION WAS DONE AFTER CAREFUL ANALYSIS OF THE VARIOUS COURT DECISIONS IN THIS STUDY.

SUCH A STUDY OF THE RELATIONSHIP BETWEEN THE SUPREME COURT FROM 1954 TO 1968 IS IMPORTANT BECAUSE IT COULD SERVE AS AN INDICATOR BOTH OF CURRENT CHANGES IN SOCIETY BUT ALSO POTENTIAL AVENUES OF CHANGES. IT IS NECESSARY FOR BLACKS TO UNDERSTAND HOW THE INSTITUTION CALLED THE SUPREME COURT HAD VIEWED THE BLACK MAN FROM 1954 TO 1968 IN ORDER TO BETTER UNDERSTAND THE COURSE THE COURT MAY TAKE IN THE EARLY 1970'S. THIS STUDY CAN BETTER HELP ONE TO UNDERSTAND THE SUPREME COURT OF 1954-1968 BY LOOKING AT IT FROM VARIOUS PERSPECTIVES. THE HISTORICAL SKETCHES OF THE JUSTICES CAN SERVE AS AN INDICATOR OF THE DIVIRGENT PERSONALITIES INTERACTING TO HELP DETERMINE THE DESTINY OF

BLACK AMERICANS.

IN ADDITION, THE ANALYSIS OF THE VOTING PATTERNS OF THE JUSTICES IN CASES INVOLVING BLACK PEOPLE TENDS TO SERVE AS A BAROMETER OF THE AREAS OF THE LAW, IN WHICH THE INDIVIDUAL JUSTICES WOULD BE MORE INCLINED TO RENDER A FAVORABLE DECISION FOR BLACK PEOPLE.

ONE SHOULD BE MINDFUL OF THE FACT THAT THERE IS A LARGE VOLUME OF LITERATURE ON THE SUPREME COURT OF THE UNITED STATES.[18] YET THE VOLUME OF LITERATURE ABOUT THE SUPREME COURT AND THE BLACK MAN IS LIMITED. LOREN MILLER, A BLACK LAWYER WROTE PROBABLY THE ONLY HISTORICAL TEXTBOOK ABOUT THE BLACK MAN AND THE SUPREME COURT. HIS HISTORICAL NARRATIVE COVERED THE PERIOD FROM 1787 TO ABOUT 1965.[19] IN THE LIGHT OF THIS APPARENT VOID IN THE LITERATURE THIS STUDY WAS DESIGNED TO HELP ELIMINATE SOME OF THE AREAS OF THE LITERATURE WHICH

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[18] THERE ARE SEVERAL SIGNIFICANT RESOURCES TO CONSIDER IN ORDER TO BETTER UNDERSTAND THE WARREN COURT. SOME OF THE BEST RESOURCES ARE: ALEXANDER BICKEL. POLITICS AND THE WARREN COURT. (NEW YORK: HARPER & ROW, 1965); BRENT BOZELL. THE WARREN REVOLUTION: REFLECTIONS ON THE CONSENSUS SOCIETY (NEW ROCHELLE, NEW YORK, 1966); ARTHUR MILLER "SOME PERVASIVE MYTHS ABOUT THE UNITED STATES SUPREME COURT." ST. LOUIS UNIVERSITY LAW JOURNAL 10 (1965); JOHN FRANK. MARBLE PALACE IN SUPREME COURT IN AMERICAN LIFE (NEW YORK: KNOPP PRESS, 1968) HARRY KALVERN. THE NEGRO AND THE 1ST AMENDMENT (CHICAGO: UNIVERSITY OF CHICAGO PRESS, 1965)

[19] LOREN MILLER. THE PETITIONERS: THE STORY OF THE SUPREME COURT AND THE NEGRO (NEW YORK: MERIDAN BOOKS, 1966)

NEEDED CLOSER EXAMINATIONS ESPECIALLY BY BLACKS.[20]

THUS, THIS INTRODUCTION HAS SERVED AS A LAMP LIGHT TO FUTURE EVENTS. CONSEQUENTLY ATTENTION SHOULD NOW BE GIVEN TO THE BIOGRAPHICAL SKETCHES OF THE JUSTICES WHO SERVED ON THE SUPREME COURT DURING THE TERMS OF THIS STUDY.

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[20] SEE JACK GREENBERG'S EXCELLENT RESOURCE BOOK ON THE LEGAL STATUS OF THE BLACK MAN AS OF 1959. THIS WAS WRITTEN FIVE YEARS AFTER THE BROWN DECISION AND FIVE YEARS BEFORE 1964 TERM OF THE SUPREME COURT. RACE RELATIONS AND AMERICAN LAW (NEW YORK: COLUMBIA UNIVERSITY PRESS, 1959)

CHAPTER II

THE NATURE OF THE SUPREME COURT FROM 1954 - 1968

In a very valuable article for the needed litigation for the realization of the Blackman's dream of becoming truly a first-class citizen in America, the Honorable Charles Black said:

> The most important single task American Law must address itself is the task of eradicating racism. The strategy of this war must address itself to the state action doctrine and to the standardized errors of attitudes which go with that doctrine.[1]

The United States Supreme Court has been given the task of interpreting the United States Constitution. Thus, if racism is really going to become a tragic page in the annals of the American past, then the United States Supreme Court must be a catalyst of the erosion of racism in American Law. At the end of the 19th century the Supreme Court helped to speed the venon of racism into the total blood stream of American life, now it must answer the calling for Justice for all, which cries out for the Constitution to reverse the harm in law that it has caused in the past.

Thus in keeping with the general theme of this paper, this writer will, in this chapter, look at the history of the Justices. This

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1. Charles Black, "States Action Equal Protection and California 14" 81 Harvard Law Review 69 (1968).

WOULD BE DONE TO SEEK TO DISCOVER THE HISTORICAL RELATIONSHIP THE JUSTICES HAVE WITH BLACK PEOPLE.

AS THIS WRITER PURPORTS TO LOOK AT THE MEMBERS OF THE WARREN COURT FROM 1954 TO 1968, ATTENTION WILL ALSO BE CAREFULLY GIVEN TO AN ANALYSIS OF THE VOTING PATTERNS OF THE MEMBERS OF THE COURT IN RACE CASES ON CASES DIRECTLY INVOLVING BLACK PEOPLE. THE BIOGRAPHIC SKETCHES OF THE MEMBERS OF THE COURT WILL NOT BE EXTENSIVE, BUT REFERENCES WILL BE MADE TO SOURCES WHICH TREAT THE VARIOUS JUSTICES MORE EXTENSIVELY. THE SPECIAL INTEREST OF THIS WRITER ON THE VARIOUS JUSTICES WAS THEIR RELATIONSHIP TO THE BLACK MAN.

IT WOULD PROBABLY BE BEST TO BEGIN THIS INQUIRY INTO THE LIVES OF THE INDIVIDUAL JUSTICES WITH CHIEF JUSTICE EARL WARREN. ONE SHOULD NOTE HERE THAT THE BEST PERSONALITY ANALYSIS OF THE MEMBERS OF THE WARREN COURT WAS DONE BY JOHN P. FRANK. THIS SIGNIFICANT WORK WAS DONE ON THE SUPREME COURT MEMBERS OF 1964.[2] THE MEMBERS OF THE COURT AT THIS TIME WERE CHIEF JUSTICE EARL WARREN, JUSTICE HUGO BLACK, JUSTICE WILLIAM O. DOUGLAS, JUSTICE TOM CLARK, JUSTICE JOHN MARSHALL HARLEM, JUSTICE WILLIAM BRENNAN, JUSTICE POTTER STEWART, JUSTICE BYRON WHITE, AND JUSTICE ARTHUR GOLDBERG. SINCE 1964 THERE HAVE BEEN SEVERAL CHANGES IN THE COURT. JUSTICE GOLDBERG AND JUSTICE TOM CLARK RESIGNED FROM THE COURT AT THE END OF THE 1965 AND 1966 TERMS RESPECTIVELY. AS A RESULT OF THESE VACANCIES

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[2] JOHN FRANK, THE WARREN COURT (NEW YORK: MACMILLAN CO., 1964).

A JEWISH SOUTHERNER, ABE FORTAS AND A BLACK CIVIL RIGHTS LAWYER, THURGOOD MARSHALL JOINED THE SUPREME COURT.

NOW LET US BRIEFLY LOOK INTO THE BACKGROUND OF CHIEF JUSTICE WARREN. HE WAS BORN IN LOS ANGELES ON MARCH 19, 1891, THE SON OF A NORWEGIAN RAILROAD MECHANIC. MR. WARREN ATTENDED THE UNIVERSITY OF CALIFORNIA, FROM WHICH HE RECEIVED HIS BASIC COLLEGE AND LAW DEGREES IN 1912 AND 1914. FROM 1914 TO 1917 HE PRACTICED LAW IN THE SAN FRANCISCO AREA. IN 1917 AND 1918 HE WAS IN THE ARMY FINISHING AS A FIRST LIEUTENANT IN THE INFANTRY.

FROM THE END OF WORLD WAR I UNTIL THE PRESENT, WARREN HAS BEEN ACTIVE IN PUBLIC LIFE. HE WAS A CITY AND COUNTY PROSECUTING ATTORNEY FROM 1919 TO 1939. IN 1943 HE BECAME GOVERNOR OF CALIFORNIA AND CONTINUED IN THAT OFFICE UNTIL HE BECAME A SUPREME COURT JUSTICE IN 1953.

AS A REPUBLICAN GOVERNOR OF CALIFORNIA, WARREN GAINED THE REPUTATION OF BEING A JUST AND FAIR-MINDED PERSON. IN 1947 HE TOLD THE CALIFORNIA CONSTITUTION CONVENTION THAT:

> THE HEART OF ANY CONSTITUTION CONSISTS OF ITS BILL OF RIGHTS THOSE PROVISIONS THAT SECURE TO THE PEOPLE THEIR LIBERTY OF CONSCIENCE, OF SPEECH, OF THE PRESS, OF LAWFUL ASSEMBLY AND THE RIGHT TO UNIFORM APPLICATION OF THE LAWS AND TO DUE PROCESS OF LAW. EVERY OTHER PROVISION OF THE CONSTITUTION SHOULD BE DESIGNED IN THE SPIRIT OF THESE BASIC RIGHTS IN ORDER TO MAKE SURE THAT THEY BECOME NOT MERE THEORETICAL RIGHTS, BUT ACTUAL RIGHTS.[3]

IN 1953 MR. WARREN SUCCEEDED CHIEF JUSTICE FRED VINSON, WHO

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[3] THE WARREN COURT, P. 25.

DIED IN SEPTEMBER OF 1953. AFTER TAKING OVER THE RIGHTS AS CHIEF JUSTICE, WARREN MADE SIGNIFICANT PROGRESS IN THE STRUGGLE FOR EQUAL RIGHTS FOR BLACKS. THE HISTORIC BROWN DECISIONS HAVE CREDITED WARREN FOR THIS EFFORTS TO MAKE AMERICA ADHERE TO THE MANDATE OF RACIAL JUSTICE. AT A LATER POINT ATTENTION WILL BE GIVEN TO THE SIGNIFICANCE OF THE VOTING PATTERNS OF JUSTICE WARREN FROM 1964-1968 IN THE STRUGGLE FOR THE ERADICATION OF RACISM IN AMERICAN LAW.

THE NEXT JUSTICE TO BE CONSIDERED IS HUGO L. BLACK. HE WAS BORN ON FEBRUARY 27, 1886, IN CLAY COUNTY, ALABAMA. HE HAD HIGH SCHOOL TYPE OF EDUCATION AT THE UNIVERSITY OF ALABAMA AT ASHLAND, ALABAMA. THIS WAS HIS SECOND CHOICE FOR HE WANTED TO GO TO THE UNIVERSITY OF ALABAMA BUT HIS GRADES WERE NOT SATISFACTORY.[4] THUS, HE TOOK UP THE STUDY OF LAW. HE GRADUATED WITH HONORS. THEN HE DECIDED TO MOVE TO BIRMINGHAM WHERE HE OPENED A LAW OFFICE. HE SOUGHT TO BROADEN HIS APPEAL BY JOINING EVERY ORGANIZATION THAT HE COULD.

THE QUESTION OF RACE CAN BE SEEN MANIFESTED THROUGHOUT THE PUBLIC LIFE OF HUGO BLACK. DAVID BERMAN SAID IN HIS ARTICLE, "THE RACIAL ISSUE AND MR. JUSTICE BLACK," THAT BLACK HAS NOT HAD ANY CONTACT WITH BLACKS ON A SOCIAL BASIS.[5] YET MR. BERMAN CONTENDS

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[4] IBID., P. 41

[5] DAVIS BERMAN, "THE RACIAL ISSUE AND MR. JUSTICE BLACK," 16 AMERICAN UNIVERSITY LAW REVIEW, P. 387 (JUNE, 1967).

THAT JUSTICE BLACK DOES NOT HAVE ANY RACISM IN HIS INTELLECTUAL MAKEUP. THIS IS A DEBATABLE POINT WHICH WILL BE CONTENDED WITH THEM ON A PROFESSIONAL BASIS. AS A PUBLIC OFFICIAL, HE HAD HIS FIRST CONTACT WITH BLACKS WHEN HE WAS A JUDGE IN POLICE COURT AT THE AGE OF 25 IN BIRMINGHAM, ALABAMA. AT THIS TIME ABOUT FORTY PERCENT OF THE PEOPLE IN BIRMINGHAM WERE POOR BLACKS. JUDGE BLACK WAS REGARDED AS A FAIR MINDED JUSTICE TO BOTH BLACKS AND WHITES. ANOTHER INSTANCE OF INTERRELATION WITH BLACKS OCCURRED WHEN BLACKS HELPED HUGO BLACK BE ELECTED SOLICITOR OF JEFFERSON COUNTY. HIS OPPOSITION WAS HARRINGTON HEFLIN, BROTHER OF UNITED STATES SENATOR TOM HEFLIN.[6] DURING HIS TENURE IN OFFICE BLACK WAS INSTRUMENTAL IN EXPOSING THE CORRUPT PRACTICES, AT THAT TIME, IN BESSEMER, ALABAMA, BY THE POLICE WHO WERE USING THE THIRD DEGREE TO GET BLACKS TO CONFESS TO CRIMES. SOLICITOR BLACK PRESENTED HIS CRITICAL REPORT OF THE PRACTICE BEFORE THE GRAND JURY OF THE COUNTY.[7]

ONE OF THE SKELETONS IN HIS CLOSET WHICH ALMOST PREVENTED HUGO BLACK FROM BECOMING SUPREME COURT JUSTICE WAS THE FACT THAT HE WAS ONCE A MEMBER OF THE K. K. K. HE WAS ASKED TO JOIN THE RACIST ORGANIZATION, AND HE OFFICIALLY JOINED ON SEPTEMBER 11, 1923, AND RESIGNED ON JULY 9, 1925. IT WAS IRONIC THAT THIS WAS TWO DAYS BEFORE HE ANNOUNCED FOR THE SENATE. YET IT IS INTERESTING TO NOTE

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[6] IBID., P. 387

[7] IBID., PP. 387-388

THAT THE STATE KLAN ORGANIZATION FAVORED HIS ELECTION. MR. BLACK SUPPORTED A CATHOLIC, AL SMITH, IN 1928 FOR PRESIDENT. MR. BLACK WAS OPPOSED FOR THE SENATE BY TOM HEFLIN IN 1930.[8]

AFTER A SHORT, BUT RATHER DISTINGUISHED CAREER AS A UNITED STATES SENATOR MR. HUGO BLACK WAS APPOINTED BY THEN PRESIDENT FRANKLIN ROOSEVELT TO THE UNITED STATES SUPREME COURT IN 1937. FROM 1937 UNTIL 1964 HE WAS A STRONG FIGHTER FOR THE RIGHTS OF MINORITIES. HE WAS A GREAT SUPPORTER OF THE BROWN CASES, IN SPITE OF THE FACT HE RECEIVED PERSONAL VENDETTE FROM MANY SOUTHERNERS FOR "BETRAYING THE SOUTH BY HIS ACTIONS." HE HAS FOUGHT FOR FAIR TRIALS FOR ALL PEOPLE AND FREEDOM OF SPEECH FOR ALL PEOPLE.[9] THE POSITION OF MR. BLACK SINCE 1964 WILL BE CONSIDERED LATER.[10]

THE THIRD JUSTICE TO BE CONSIDERED IS JUSTICE WILLIAM O. DOUGLAS.[11] HE WAS BORN IN OTTERTAIL COUNTY, MINNESOTA, ON OCTOBER 16, 1898. HIS FATHER WAS A PRESBYTERIAN HOME MISSIONARY. AT THE AGE OF SIX MR. DOUGLAS' FATHER PASSED. DESPITE THE HARDSHIP OF BEING A POOR BOY, MR. DOUGLAS EARNED HIS WAY THROUGH WHITMAN COLLEGE AT WALLA WALLA, WASHINGTON. HE SERVED IN THE FIRST WORLD WAR AND

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[8] IBID., P. 388

[9] WARREN COURT, P. 40

[10] FOR FURTHER INFORMATION ON THE LIFE AND WORK OF MR. BLACK SEE THE FOLLOWING SOURCE: JOHN FRANK, MR. JUSTICE BLACK, THE MAN AND HIS OPINION (NEW YORK: ALFRED KNOPP, 1949).

[11] SEE JOHN SCHMIDHAUSER, "THE JUSTICES OF THE SUPREME COURT: COLLETIVE PORTRAIT," 3 MIDWEST JOURNAL OF POLITICAL SCIENCE (1959)

THEN CAME HOME TO FINISH HIS COLLEGE WORK IN 1920. IN 1922 HE ENTERED COLUMBIA LAW SCHOOL WHERE HE GRADUATED IN 1925. AFTER THREE YEARS OF LAW PRACTICE, TWO OF THEM WITH AN EXCLUSIVE LAW FIRM, HE WENT TO JOIN THE YALE LAW FACULTY. UNDER DEAN ROBERT HUTCHINS WHO LEFT YALE IN 1930 TO BECOME PRESIDENT OF THE UNIVERSITY OF CHICAGO. IN 1939 PRESIDENT ROOSEVELT APPOINTED WILLIAM O. DOUGLAS. THUS DURING HIS CAREER AS A JUSTICE, DOUGLAS HAS BEEN A STRONG ADVOCATE OF INDIVIDUAL LIBERTY. HE HAS BEEN A STRONG ADVOCATE FOR EQUAL RIGHTS AND JUSTICE FOR BLACKS.[12]

THE FOURTH JUSTICE TO BE CONSIDERED IS JUSTICE TOM CLARK. HE WAS BORN ON SEPTEMBER 22, 1898, IN DALLAS, TEXAS. HE WAS EDUCATED AT VIRGINIA MILITARY INSTITUTE 1917-1918. HE RECEIVED HIS A.B. DEGREE IN 1921 FROM THE UNIVERSITY OF TEXAS AND ALSO HIS LLB IN 1922.[13]

MR. CLARK HAS LED A RATHER STRANGE PUBLIC LIFE. HE WAS GIVEN THE JOB OF ASSISTANT ATTORNEY GENERAL IN THE UNITED STATES DEPARTMENT OF JUSTICE DUE TO THE EFFORTS OF A FAMILY FRIEND, SENATOR TOM CONNALLY OF TEXAS. DURING WORLD WAR II, CLARK WAS APPOINTED CIVILIAN COORDINATOR TO THE WESTERN DEFENSE COMMAND BY PRESIDENT ROOSEVELT. HIS DUTY WAS TO CURFEW ALL PERSONS WHO WERE REGARDED AS ENEMY ALIENS, INCLUDING NATIVE BORN JAPANESE, AND TO RELOCATE THEM IN AN INLAND CAMP. THIS ACTION WAS PURELY RACIALLY MOTIVATED, FOR MANY OF THE JAPANESE AMERICANS WERE TAKEN FROM THEIR HOMES, AND THEIR PROPERTIES

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12 WARREN COURT, PP. 57-76

13 WHO'S WHO IN AMERICAN POLITICS 1969-1970, P. 216.

WERE CONFISCATED BY THE STATE. MR. CLARK SIMPLY FOLLOWED THE ORDERS OF WASHINGTON. ONE SHOULD NOTE HE ARGUED THE LEGALITY OF THE CURFEW REGULATIONS. FOR THIS RACIST ACT HE GAINED A SIGNIFICANT PROMOTION. HE WAS APPOINTED AS HEAD OF THE ANTITRUST DIVISION OF THE ATTORNEY GENERAL'S OFFICE. HIS NEXT BIG APPOINTMENT WAS TO BECOME THE UNITED STATES ATTORNEY GENERAL. THEN IN 1949 AFTER JUSTICE FRANK MURPHY DIED, PRESIDENT TRUMAN APPOINTED TOM C. CLARK TO FILL THIS VACANCY ON THE COURT.

WHEN IT WAS LEARNED THAT TOM CLARK WAS GOING TO BECOME A SUPREME COURT JUSTICE, HE WAS OPPOSED BY MANY PEOPLE INCLUDING BLACKS. HE WAS CHARGED WITH BEING A RED-BAITING EXTREMIST, INSENSITIVE TO RIGHTS OF FREE SPEECH AND FREE ASSOCIATION. HE WAS ALSO CHARGED WITH BEING HOSTILE TO BLACK PEOPLE. SINCE HIS APPOINTMENT TO THE COURT UP UNTIL 1964, HE HAS BEEN WITH THE MAJORITY IN SUBSTANTIALLY EVERY CASE UPHOLDING NEGRO RIGHTS.[14] HIS RECORD SINCE 1964 WILL BE ANALYZED LATER IN THIS PAPER.

THE NAME OF JOHN MARSHALL HARLAN IS A VERY FAMILIAR NAME TO BLACK PEOPLE WHO ARE CONCERNED ABOUT THE FORCES THAT DETERMINE THEIR DESTINY. THIS IS THE NAME OF A JUSTICE WHO SERVED ON THE SUPREME COURT FROM 1877 TO 1911. HE WAS A GREAT BELIEVER THAT THE CONSTITUTION WAS COLOR BLIND WHILE HIS ASSOCIATES ON THE COURTS WERE ADVOCATING A RACIST SECOND CLASS POSITION FOR THE BLACK MAN. THIS

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[14] JOHN FRANK, WARREN COURT, PP. 77-96

MAN WAS THE GREAT DISSENTER OF HIS DAY. TODAY HIS NAMESAKE GRANDSON IS THE GREAT DISSENTER ON THE PRESENT COURT. THE PRESENT-DAY DISSENTER DOES NOT GENERALLY VOTE FOR THE BLACK MAN.

MR. J. M. HARLAN WAS BORN IN CHICAGO, ILLINOIS, ON MAY 20, 1899. HE RECEIVED HIS A. B. DEGREE FROM PRINCETON UNIVERSITY IN 1920. HE WAS A RHODES SCHOLAR AT BALLIOL COLLEGE IN EXFORD, ENGLAND, WHERE HE RECEIVED A B. A. IN JURISPRUDENCE IN 1923. HE RECEIVED A LLB FROM NEW YORK UNIVERSITY LAW SCHOOL IN 1924.[15] HARLAN'S LEGAL CAREER WAS LARGELY SPENT ON WALL STREET WHERE HE WAS A CASE-TRYING PARTNER FOR ONE OF THE MOST FAMOUS LAW FIRMS IN THE COUNTRY, THE FIRM OF WHICH THOMAS E. DEWEY IS NOW SENIOR PARTNER. AS A RESULT OF HIS BACKGROUND, HE WAS A HERO IN WORLD WAR II FOR HE RECEIVED THE LEGION OF MERIT FROM THE UNITED STATES AND THE FROIT DE GUERRE FROM THE FRENCH. IN 1954, HE WAS APPOINTED TO THE COURT OF APPEALS IN 1954. IN NOVEMBER OF 1954 PRESIDENT EISENHOWER ADVANCED HARLAN TO THE SUPREME COURT TO REPLACE ROBERT JACKSON. SINCE 1961 ON THE NUMBER OF DISSENTS HARLAN HAD WRITTEN BEGAN TO STEADILY INCREASE.[16]

THE NEXT JUSTICE TO BE CONSIDERED IS WILLIAM BRENNAN.[17] HE

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[15] WHO'S WHO IN AMERICAN POLITICS 1969-70. P. 483

[16] JOHN FRANK, WARREN COURT, PP. 97-112

[17] DURING THE EARLY YEARS OF THE WARREN COURT ASSOCIATE JUSTICES STANLEY F. REED, HAROLD H. BURTON, ROBERT JACKSON, SHERMAN MINTON, CHARLES E. WHITTAKER AND FELIX FRANKFURTER SERVED ON THE COURT. MOST

WAS BORN IN NEWARK, NEW JERSEY, ON APRIL 25, 1906. MR. BRENNAN RECEIVED HIS B. S. FROM THE UNIVERSITY OF PENNSYLVANIA IN 1928. HE RECEIVED HIS LLB FROM HARVARD IN 1931. MR. BRENNAN SERVED AS SUPERIOR COURT JUDGE FROM 1949-1950; APPELLATE DIVISION JUDGE, NEW JERSEY 1950-1952; JUSTICE, NEW JERSEY SUPREME COURT 1952-1956. HE WAS APPOINTED ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES IN 1956.

MR. POTTER STEWART WAS CONSIDERED AS THE JUSTICE OF THE WORLD WAR II GENERATION, SINCE HE WAS ONLY FORTY-THREE WHEN APPOINTED TO THE COURT IN 1958. MR. STEWART WAS BORN IN JACKSON, MICHIGAN, ON JANUARY 23, 1915. MRS. STEWART WAS EDUCATED AT YALE COLLEGE WHERE HE RECEIVED HIS B. A., CUM LAUDE, 1937; CAMBRIDGE UNIVERSITY FELLOW, 1937-38; YALE LAW SCHOOL LLB. CUM LAUDE, 1941; PHI BETTA KAPPA. MR. STEWART HAS SERVED AS VICE MAYOR OF CINCINNATI, OHIO, 1952-53; U. S. JUDGE, COURT OF APPEALS, SIXTH CIRCUIT 1954-58 AND WAS APPOINTED TO THE SUPREME COURT IN 1958.[18]

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[17] OF THESE MEN DID NOT PARTICIPATE IN THE MAJOR CASES CITED IN THIS STUDY. THE FOLLOWING REFERENCES WOULD BE HELPFUL IN AN INVESTIGATION OF THESE JUSTICES: DR. HARLAN PHILLIPS. FELIX FRANKFURTER REMINISCES. (NEW YORK: REYNAL & CO., 1960); ROSALIE M. GORDON. NINE MEN AGAINST AMERICA NEW YORK: THE DEVIN-ADAIR CO., 1962) SIDNEY H. ASCH THE SUPRENE COURT AND ITS GREAT JUSTICES, NEW YORK: ARCO PUBLISHING CO. INC. 1971); ALPHEUS THOMAS MASON THE SUPREME COURT FROM TAFT TO WARREN BATON ROUGE: LOUISIANA STATE UNIVERSITY PRESS, 1968) WALLACE MENDELSON, ED. FELIX FRANKFURTER: A TRIBUTE. NEW YORK: WILLIAM MORROW & CO., 1964); ROBERT H. JACKSON THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT. CAMBRIDGE. HARVARD UNIVERSITY PRESS, 1955.

[18] WHO'S WHO IN AMERICAN POLITICS IN 1969-1970 P. 1105

Football players are not always dumb. This is evident by the fact that a former all-American football player, Byron White was appointed to the Supreme Court. He was born in Fort Collins, Colorado on June 8, 1917. Mr. White was educated at the University of Colorado where he received his B. A. degree in 1938. He was a Rhode Scholar at Oxford University in 1939. He received his LLB in 1946 from Yale Law School, and was elected to Phi Beta Kappa. Justice White served as Law Clerk to the Chief Justice of the United States from 1946-1947; appointed Deputy Attorney General of the United States from 1961 to 1962. President John Kennedy appointed his friend, Byron White, to become Associate Justice of the Supreme Court.[19]

The next Justice to be considered is Arthur Goldberg. He was born in Chicago, Illinois, on August 8, 1908. He was educated at Crane Junior College where he received a B. S. L. in 1929. In 1930 he received a J. D. from Northwestern. He was Secretary of Labor from 1961-1962. In 1962 he was appointed Associate Justice of the Supreme Court where he served until 1965. After the death of Adlai Stevenson, Mr. Goldberg was persuaded by President Johnson to resign as a Supreme Court Justice in order to become the United States Ambassador to the United Nation where he served until 1968. Mr. Goldberg is a reformed Jew by religious affiliation.[20]

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19 Ibid.

20 Ibid.

After Mr. Goldberg resigned from the Court he was replaced by another Jew. According to Who's Who in American Politics, Abe Fortas was born in Memphis, Tennessee on June 19, 1910. He married Carolyn Agger on July 9, 1935. Mr. Fortas received his A. B. degree in 1930 from Southwestern College in Memphis, Tennessee, and his LLB. from Yale in 1933. He served as Director of the Division of Power in the Department of the Interior from 1931-1942; Under-secretary of the Interior, 1942-1946; Assistant Chief, Legal Division of the Agriculture Adjustment Administration 1933-1934. Acting General Counsel National Power Policy Commission in 1941. President of the Commission to Study Changes in the Organic Law of Puerto Rico, 1943; Advisor to the United States Delegation at meeting of the United Nation in San Francisco in 1945 and in London in 1946. He served as Associate Supreme Court Justice from 1965-1969.[21]

The last justice who served was the first Black Supreme Court Justice Thurgood Marshall. He was born in Baltimore, Maryland, on July 2, 1908. Mr. Marshall received his A. B. degree from Lincoln University in 1930; LLD, 47, Howard University, LL.B., LL.D, 54. Mr. Marshall has been a leader in the legal struggle for equal rights for Blacks. His many civil rights cases argued by him before the Supreme Court included the Texas Primary Case in 1944, Restrictive Covenant Cases in 1948, University of Texas and Oklahoma Cases in 1950; visited Japan and Korea to investigate court martial cases involving

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21 Who's Who in American Politics 1969-70, p. 433

BLACK SOLDIERS, 1951, AND SCHOOL SEGREGATION CASES, 1952-53. UNITED STATES CIRCUIT JUDGE 1961-65, U. S. SOLICITOR GENERAL 1965-1967. DIRECTOR, COUNSEL LEGAL DEFENSE AND EDUCATION FUND OF THE NAACP - 1940-1961, ASSOCIATE JUSTICE U. S. SUPREME COURT 1967.[22]

THUS THE LITTLE BIOGRAPHIC MELODRAMA HAS ENDED. THE ELEVATION OF MEN FROM THE NORTH, FROM THE SOUTH, FROM THE EAST AND FROM THE WEST HAS BEEN MENTIONED. NOW, WHY IS THE TYPE OF MEN ON THE SUPREME COURT SO IMPORTANT TO THE BLACK MAN AND WHAT WAS THE SCORE CARE FOR THE INDIVIDUAL JUSTICES IN CASES INVOLVING BLACK PEOPLE FROM 1964 TO 1968? SUPREME COURT JUSTICES ARE MEN WITH VARIOUS MINDS AND DIVERSIFIED BACKGROUNDS WHO INTERPRET THE CONSTITUTION IN TERMS OF THEIR OWN EXPERIENCE, JUDGEMENTS ABOUT PRACTICAL MATTERS AND THEIR IDEAL PICTURE OF SOCIAL ORDER.[23] IT IS QUITE SIGNIFICANT TO NOTE THAT MOST OF THE MEMBERS OF THE COURT HAD LITTLE OR NO EXPERIENCE WITH BLACKS ON A MAN TO MAN BASIS, MOSTLY STRICTLY ON A PHILOSOPHICAL BASIS. JOHN SCHMIDHAUSER SAID IN HIS WORK <u>THE JUSTICES OF THE SUPREME COURT: A COLLECTIVE PORTRAIT</u> THAT THERE IS A VERY HIGH FREQUENCY AMONG THOSE PERSONS APPOINTED TO THE SUPREME COURT TO BE PERSONS ON A VERY HIGH SOCIAL STATUS.[24] IN ADDITION ONE SHOULD NOTE

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[22] <u>IBID.</u>

[23] SIDNEY ULMAN, "THE ANALYSIS OF BEHAVIOR PATTERNS OF THE UNITED STATES SUPREME COURT," 22 <u>JOURNAL OF POLITICS</u>, P. 629 (1960).

[24] JOHN SCHMIDHAUSER, "THE JUSTICES OF SUPREME COURT: A COLLECTIVE PORTRAIT" 3 <u>MIDWEST JOURNAL OF POLITICAL SCIENCE</u> 1 (1959).

THAT SUPREME COURT POSITIONS HAVE BEEN FREQUENTLY USED TO SETTLE LARGE DEBTS IN THE MARKET PLACES OF POLITICS. THUS IN THE LIGHT OF THE GREAT BARRIER THAT EXISTS BETWEEN THE UPPER ECHELON IN AMERICAN SOCIETY, AND THE POOR WHITE AND BLACK MASSES, MANY OF THE JUSTICES' DECISIONS, DURING THE PERIOD STUDIED AND DURING OTHER PERIODS, ARE NOT ATTUNED TO THE URGENT NEEDS OF BLACK AMERICA. ON THE OTHER HAND, ONE MUST KEEP IN MIND THAT THE ELITE FORMATIVE EXPERIENCES OF THE JUSTICES COULD HAVE PLAYED A SIGNIFICANT ROLE IN THEIR ACTIONS.

IN THE LIGHT OF THIS BACKGROUND STUDY, ATTENTION SHOULD NOW BE GIVEN TO AN ANALYSIS OF THE VOTING PATTERN OF THE JUSTICES. THIS STUDY OF THE VOTING PATTERN OF THE SUPREME COURT JUSTICES WAS TAKEN FROM THE SUPREME COURT CASES FROM 1964 TO 1968. THE MAIN CRITERIA IN SELECTING THE CASES WAS TO DETERMINE IF THE INDIVIDUAL CASES DIRECTLY INVOLVE BLACK PEOPLE. THERE WERE FORTY-SIX CASES SELECTED IN VARIOUS AREAS. THESE CASES DEALT WITH TRIALS, JURIES, FAMILY RELATION, VOTING, REPRESENTATION, HOUSING, RECREATIONAL FACILITIES, PUBLIC ACCOMMODATIONS AND FREE SPEECH. THE DATA WAS TABULATED ON VARIOUS CHARTS TO HELP CLASSIFY THE MATERIAL.

THIS STUDY HAS BROUGHT TO LIGHT SOME INTERESTING FACTS. AT A QUICK GLANCE AT THE CHART ONE WOULD ASSUME THAT THE MAJORITY OF THE MEMBERS OF THE SUPREME COURT NEARLY ALWAYS VOTED IN FAVOR OF BLACK PEOPLE. THIS POSITION CAN BE READILY ACQUIRED FROM THE FACT THAT JUSTICES MARSHALL'S, FORTAS' AND GOLDBERG'S VOTING RECORDS SHOWED A 100% VOTING RECORD IN FAVOR OF BLACK PEOPLE. YET THE RELIABILITY OR WORTH OF THESE PERCENTAGES IN RELATIONS TO THE TOTAL

STUDY MUST BE QUALIFIED. JUSTICE MARSHALL PARTICIPATED IN ONLY FIVE CASES CONSIDERED IN THIS STUDY. THIS LIMITED INVOLVEMENT WAS PARTICALLY DUE TO THE FACT THAT HE DID NOT JOIN THE SUPREME COURT UNTIL 1967. IN ADDITION, IT WAS ALSO DUE TO THE FACT THAT HE HAD TO DISQUALIFY HIMSELF FROM VOTING IN SEVERAL CASES BECAUSE HE HAD BEEN INVOLVED IN THE PREPARATION OF THE CASES TO BE PRESENTED BEFORE THE SUPREME COURT. HE HAD SERVED AS UNITED STATES SOLICITOR GENERAL FROM 1965 TO 1967. THE EXTENT OF HIS PARTICIPATION WAS 11% OF THE FORTY-SIX CASES. THUS, THE 100% VOTING RECORD OF JUSTICE MARSHALL MUST BE VIEWED IN RELATION TO THE TOTAL NUMBER OF CASES.

THE SAME CRITERIA SHOULD BE USED TO EVALUATE THE VOTING RECORD OF JUSTICES FORTAS, AND GOLDBERG. JUSTICE ARTHUR GOLDBERG WAS A MEMBER OF THE SUPREME COURT DURING THE 1964 AND 1965 TERMS OF THE SUPREME COURT.

IT WAS EVIDENT THROUGHOUT THE STUDY THAT THE JUSTICES TENDED TO BE MORE LIKELY TO VOTE FAVORABLE TOWARD THE POSITION OF BLACK PEOPLE ONLY IN CERTAIN AREAS OF LAW. CHIEF JUSTICE EARL WARREN TENDED TO NEARLY ALWAYS VOTE IN FAVOR OF THE POSITION OF BLACK PEOPLE. HIS PRO-BLACK VOTING RECORD IS 96%. HE ONLY VOTED AGAINST THE POSITION OF BLACK LITIGANTS IN TWO CASES. ONE DEALT WITH PUBLIC ACCOMMODATIONS AND THE OTHER CASE DEALT WITH FREE SPEECH.

ONE SHOULD ESPECIALLY NOTE THAT JUSTICE BLACK HAD BEEN CONSIDERED AS ONE OF THE LEADERS OF THE LIBERAL WING OF THE COURT PRIOR TO 1964.[25] HIS OPINIONS AND VOTING RECORD IN THIS STUDY SHOWED HE

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[25]SEE "CIVIL RIGHTS SYMPOSIUM" 43 UNIVERSITY OF DETROIT LAW

HAD JOINED WITH JUSTICE HARLAN TO BE THE LEADERS OF THE MEMBERS OF THE COURT TO CONSISTENTLY VOTE AGAINST BLACK PEOPLE.[26] THIS ACTION BY JUSTICE BLACK WILL BE FURTHER CONSIDERED IN A LATER CHAPTER. SINCE THIS STUDY WAS ABOUT THE ROLE OF THE SUPREME COURT TOWARD THE BLACK MAN FROM 1964 TO 1968 IT WAS FELT NECESSARY TO CONSIDER THE ACTIONS OF JUSTICE BLACK. HE SEEMED TO HAVE REVERSED HIS EARLIER TENDENCIES TO VOTE IN FAVOR OF BLACK PEOPLE BEFORE THE SUPREME COURT. FROM THE STUDY SEVERAL NOTEWORTHY FACTS WERE DISCOVERED. JUSTICE BLACK PARTICIPATED IN 45 OUT OF THE 46 CASES. HE TENDED TO VOTE OVERALL IN FAVOR OF THE POSITION OF BLACK PEOPLE IN 55% OF THE CASES. HE WAS MORE INCLINED TO VOTE IN FAVOR OF BLACK PEOPLE IN CASES INVOLVING EDUCATION, VOTING, REPRESENTATION, AND FAMILY RELATIONS, THAN IN CASES INVOLVING FREE SPEECH, AND RECREATIONAL FACILITIES.

ATTENTION SHOULD NOW BE GIVEN TO THE VOTING RECORDS OF JUSTICE DOUGLAS AND JUSTICE CLARK. JUSTICE DOUGLAS HAD AN OVERALL PRO-BLACK VOTING RECORD OF 96%. HE VOTED AGAINST THE POSITION OF BLACK PEOPLE IN A HOUSING CASE AND A PUBLIC ACCOMMODATION CASE. ON THE

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[25] JOURNAL 253 (1965) FOR AN ANALYSIS OF THE SIGNIFICANT CASES INVOLVING BLACK PEOPLE FROM THE PERSPECTIVE OF ANALYZING THE DECISIONS OF THE JUSTICES FROM 1960 TO 1964.

[26] THERE ARE SEVERAL VALUABLE RESOURCES IN THE AREA OF BEHAVIORAL RESEARCH ON SUPREME COURT JUSTICES WHICH BEARS SCRUTINY. THEY ARE AS FOLLOWS: (A) JOEL GROSSMAN. DISSENTING BLOCS ON WARREN COURT 24 JOURNAL OF POLITICS 1028 (1968); (B) JOEL GROSSMAN. SOCIAL BACKGROUND AND JUDICIAL DECISIONS 29 JOURNAL OF POLITICS 334 (1967); (C) LINDA FESTA AND L. D. VICHULES. "CLIQUES ON SUPREME COURT: MYTH ON REALITY" 9 SOCIOLOGICAL QUARTERLY. 540 AUTUMN (1968)

OTHER HAND, HE TENDED TO VOTE AGAINST THE CLAIMS OF BLACK PEOPLE IN THE AREAS OF FREE SPEECH AND TRIALS.

THE NEXT TWO JUSTICES TO BE CONSIDERED WERE JUSTICES HARLAN AND JUSTICES BRENNAN. JUSTICE HARLAN PARTICIPATED IN ALL OF THE CASES. HE TENDED TO VOTE IN FAVOR OF THE POSITION OF BLACK PEOPLE IN ONLY 41 PER CENT OF THE 46 CASES. HE ONLY VOTED IN FAVOR OF BLACK PEOPLE IN SOME CASES DEALING WITH EDUCATION, PUBLIC ACCOMMODATION, JURIES AND REPRESENTATION. HIS VOTING RECORD TENDED TO BE THAT OF HIS HISTORICAL BACKGROUND OF BEING THE LEGAL DEFENDER OF THE FINANCIAL POWER STRUCTURE OF WALL STREET. HIS VOTING RECORD IN FAVOR OF BLACK PEOPLE IN THE OTHER AREAS TENDED TO RANGE FROM FIFTY PER CENT TO ZERO PER CENT. ON THE OTHER HAND, JUSTICE BRENNAN HAD A BETTER VOTING RECORD. HE TENDED TO HAVE AN OVERALL VOTING RECORD OF 88% OF THE CASES IN FAVOR OF BLACK PEOPLE. THE ONLY AREA IN WHICH THERE WAS A SIGNIFICANT DISSENTING VOTING PATTERN AGAINST THE POSITION OF BLACK PEOPLE WAS IN THE AREA OF PUBLIC ACCOMMODATIONS.

NOW ATTENTION SHOULD BE GIVEN TO JUSTICE STEWART AND JUSTICE WHITE. JUSTICE STEWART PARTICIPATED IN 45 OF THE CASES. HE TENDED TO VOTE IN FAVOR OF BLACK PEOPLE IN 71% OF THE CASES. HE VOTED IN FAVOR OF BLACKS IN NINE OUT OF TEN AREAS OF CONSIDERATION. HE VOTED AGAINST BLACK PEOPLE IN CASES DEALING WITH FREE SPEECH. ON THE OTHER HAND JUSTICE WHITE'S RECORD WAS NOT VERY DIFFERENT FROM JUSTICE STEWART. JUSTICE WHITE VOTED IN FAVOR OF THE CONSTITUTIONAL CLAIMS IN 65% OF THE 46 CASES. HE TENDED TO VOTE AGAINST THE POSITION OF BLACK PEOPLE IN THE AREAS OF FREE SPEECH AND PUBLIC ACCOMMODATIONS.

One should keep in mind the fact that the historical background of most of the Justices supported the view that they did not generally have much dealing with Blacks on a social level. This feature was regarded as a common contributing factor to the perpetuation of White racism in public institutions. One can not adequately understand the voting record of the Justices in this study without understanding the nature of the cases under consideration. Thus an analysis of the significant cases are in order. The period of 1954 to 1968 was noted for the passage of several significant Civil Rights laws. Thus, it seems in order to begin the analysis of the significant cases with an analysis of the cases in this study which dealt with determing the constitutionality of the Civil Rights Acts passed by Congress during the time of this study.

TABLE I

SUPREME COURT CASES INVOLVING BLACKS
1964-1968 TERMS
(JUSTICES)

Type of Cases	Warren		Black		Douglas		Clark		Harlan		Brennan		Stewart		White		Fortas		Goldberg		Marshall	
	Pro	Con	Pro	Con	Pro	Con	Pro	Con	Pro	Con	Pro	Con	Pro	Con	Pro	Con	Pro	Con	Pro	Con	Pro	Con
Education	5	0	5	0	5	0	5	0	5	0	5	0	5	0	5	0	5	0				
Family Relations	2	0	2	0	2	0			0	2	2	0	2	0	2	0	2	0			2	0
Public Accom.	7	1	4	4	7	1	7	1	7	1	2	6	7	1	3	5			6	0		
Recre. Fac.	3	0	0	3	3	0	2	1	0	3	2	1	2	1	2	1	2	0	1	0		
Free Speech	7	1	2	5	8	0	2	6	2	6	6	2	2	5	3	5	4	0	4	0		
Housing	2	0	1	1	1	1	1				1		1	1	1	1	2	0				
Juries	3	0	2	1	3	0	2	1	2	1	2	1	2	1	2	1	2	0	1	0		
Trials	8	0	4	4	8	0	0	2	3	3	8	0	6	2	5	3	8	0			3	0
Voting	6	0	4	2	6	0	6	0	3	3	6	0	5	1	6	0	3	0	3	0		
Represen-tation	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0				
Total	44	2	25	20	44	2	26	11	19	27	45	5	32	13	30	16	29	0	15	0	5	0
Per-centage	96	4	55	45	96	4	70	30	41	59	88	12	71	29	65	35	100	0	100	0	100	0

CHAPTER III

THE ETHICAL IMPLICATIONS OF THE SUPREME COURT AND THE CIVIL RIGHTS ACTS

In an address at Howard University on June 4, 1964, President Johnson announced plans for a White House Conference on Civil Rights. He said:

> Nothing in any country touches us more profoundly, and nothing is more frighted with meaning for our own destiny than the revolution of the Negro American.... In our time change has come to this nation too. The American Negro, acting with impressive restraint, has peacefully protested and marched demanding a justice that has long been denied. The voice of the Negro was a call to action. But it is a tribute to America that, once aroused the Courts, and Congress, the President and most of the people have been the allies of progress..... Thus, we have seen the high court of the country declare that discrimination based on race was repugnant to the Constitution, and therefore void. We have seen in 1957, 1960 and again in 1964, the first Civil Rights legislation in this nation in almost an entire century. (These victories) as Winston Churchill said of another victory for freedom - is not the end. It is not even the beginning of the end but it is, perhaps the end of the beginning.[1]

The Executive Branch, the Legislative Branch and the Judicial Branch of the United States Government are composed of people who are mostly, White Anglo-Saxon Protestants. They have been given the awesome responsibility of making, of interpreting, and of carrying out the laws of the United States of America. People involved in this process are political beings who formulate their values, beliefs and

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[1] Revolution in Civil Rights. Congressional Quarterly Service, June 1968, p. 26

ATTITUDES THROUGH VARIOUS FORMS OF SOCIAL, EDUCATIONAL, POLITICAL, AND RELIGIOUS INDOCTRINATIONS. THEY LEARN FROM THEIR PARENTS, FRIENDS, SCHOOLMATES, BUSINESS ASSOCIATES, CHURCHES, POLITICAL AND SOCIAL INSTITUTIONS. THROUGH THIS PROCESS OUR MOSTLY WHITE GOVERNMENTAL LEADERS TEND TO DEVELOP CERTAIN BELIEFS ABOUT PEOPLE WHO ARE CALLED BLACK, NEGRO OR AFRO-AMERICAN. THIS MINORITY GROUP TENDS TO BE REGARDED AS INFERIOR BY THE WHITE ANGLO-SAXON PROTESTANTS.

INSTITUTIONAL RACISM IS DEEPLY EMBEDED IN AMERICAN SOCIETY. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THIS VIEW AMONG OUR DOMINANT AMERICAN INSTITUTIONS: EDUCATIONAL, ECONOMIC, POLITICAL, LEGAL, AND MEDICAL. AS A RESULT OF PRACTICES WITHIN THESE INSTITUTIONS BLACK CITIZENS IN AMERICA ARE CONSISTENTLY PENALIZED FOR REASONS OF COLOR.[2] PRESIDENT JOHNSON FAILED TO INDICATE IN HIS SPEECH THAT CONGRESS, THE PRESIDENT AND THE COURTS HAVE NOT REALLY TAKEN AFFIRMATIVE ACTION AS CORPORATE BODIES IN ACTING AS THE DEFENDERS OF THE RIGHTS OF ALL OF THE PEOPLE OF THE UNITED STATES.

THE LEADERSHIP IN CONGRESS, IN THE PRESIDENCY, AND IN THE UNITED STATES SUPREME COURT HAS BEGUN TO RECOGNIZE THE POLITICAL POTENTIAL OF POWER MANIFEST BY BLACK AMERICANS IN THE 1960'S. THE BLACK ACTIVISM FOR FREEDOM, JUSTICE AND EQUAL ACCESS TO RIGHTS, PRIVILEGES AND RESPONSIBILITIES OF BEING AN AMERICAN HAS BEEN SEEN ON A MORE MASSIVE BASES IN THE 1960'S THAN IN ANY OTHER TIME IN AMERICAN HISTORY.

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[2] INSTITUTIONAL RACISM IN AMERICA EDITED BY LOUIS L. KNOWLES AND KENNETH PREWITT (ENGLEWOOD CLIFFS: PRENTICE - HALL, INC. 1967) P. 6-7

A CLOSE SCRUTINY OF THE RECORDS OF THE MAIN POLITICAL INSTITUTIONS IN AMERICAN LIFE DOES NOT REFLECT DECISIONS, LAWS, AND EXECUTIVE ORDERS ADEQUATELY RESPONSIVE TO THE NEEDS AND ASPIRATIONS OF ALL AMERICANS. WHILE NEARLY AT THE SAME TIME THESE POLITICAL FORCES FAIL TO ADEQUATELY GRASP THE DEPTH OF THE PROBLEMS WHICH ARE NURTURING THE SEEDS OF DESTRUCTION IN AMERICA.

THE SUPREME COURT HAS SAID THAT DISCRIMINATION BASED UPON RACE IS UNCONSTITUTIONAL. THE COURT HAS TAKEN SOME PROGRESSIVE STEPS DESIGNED TO ELIMINATE THE BADGES OF SERVITUDE THAT CONFRONT THE AMERICAN BLACK MAN. THIS CHAPTER WILL LOOK AT DECISIONS OF THE SUPREME COURT WHICH ADDRESS THEMSELVES TO THE CIVIL RIGHTS ACTS PASSED BY CONGRESS IN 1964, 1965 AND IN 1968 FROM AN ETHICAL PERSPECTIVE. INSTITUTIONAL RACISM WILL BE VIEWED AS A DISTORTED ETHICAL DEFENSIVE MECHANISM TO SUPPORT THE HISTORICAL DOMINATION OF THE WHITE ANGLO-SAXON PROTESTANT IN CONTROLLING THE MAJOR INSTITUTIONS OF AMERICAN LIFE. ATTENTION WILL BE DEVOTED TO ANALYZING THE CASES FROM THE PERSPECTIVE OF A TRULY SUBSTANTIVE EFFORT TO BRIDGE THE GAP BETWEEN DELIBERATE SPEED TO ELIMINATE RACISM AND INSTITUTIONAL EVASION OF DETERMING THE CONSTITUTIONALITY OF THE BLACK'S RIGHTS. ONE SHOULD NOTICE THAT IN THE SIGNIFICANT CASES FOUND IN THIS STUDY THE COURT TOOK SOME STEPS FORWARD, BUT IT DID NOT GO AS FAR AS IT COULD HAVE IN ORDER TO DESTROY THE STAMP OF STATE SUPPORT OF INSTITUTIONAL RACISM IN AMERICAN LIFE.

THERE WERE THREE SIGNIFICANT CASES IN WHICH THE SUPREME COURT DEALT WITH THE CONSTITUTIONALITY OF THE 1964 CIVIL RIGHTS ACT.

These cases were Heart of Atlanta Motel v United States,[3] Katzenbach v McClung,[4] Hamm v City of Rock Hill.[5]

In these cases the Supreme Court had opportunities to face the issues of institutional racism and to stamp out the badges of prejudices. Yet, again the court resorted to utilizing historical institutional evasive practices. The court did make some movement toward freedom for the Black man, but did not move far enough in order to bring victory for freedom.

Attention should be given to a closer examination of the Heart of Atlanta Motel v United States case. This case dealt with a declaratory judgment action attacking the constitutionality of Title II of the Civil Rights Act of 1964.[6] This section dealt with public accommodations which was the most controversial section of the 1964 Civil Rights Act. The legislative history of the act indicates that Congress based the act on section five of the 14th Amendment, which gave Congress the authority to pass any legislation which was needed in order to enforce the provisions of the 14th Amendment. In addition, the act was also based on the Equal Protection Clause of

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[3] 379 U. S. 241 (1964)

[4] 379 U. S. 294 (1964)

[5] 379 U. S. 306 (1964)

[6] See the provisions of the Civil Rights Act of 1964 (HR 7125 - - PL 88 - 352) in Revolution in Civil Rights. Washington: Congressional Quarterly Service, June 1968, pp. 62-65.

THE 14TH AMENDMENT AS WELL AS ON THE CONGRESSIONAL POWER TO REGULATE INTERSTATE COMMERCE UNDER ARTICLE 1, PARAGRAPH 8, CLAUSE 3 OF THE CONSTITUTION. THE SUPREME COURT DID NOT CONSIDER THE CONSTITUTIONALITY OF THE ACT UNDER SECTION FIVE OF THE 14TH AMENDMENT, BUT ONLY THE COMMERCE CLAUSE.

THERE IS SOME DICTUM IN THE COURT'S OPINION BY JUSTICE CLARK THAT SUBSTANTIATES THE INSTITUTIONAL EVASIVE TECHNIQUES OF THE COURT. THE COURT QUOTED THE SENATE COMMERCE COMMITTEE CONTENTION THAT THE FUNDAMENTAL OBJECTIVE OF TITLE II WAS TO VINDICATE THE DEPRIVATION OF PERSONAL DIGNITY THAT SURELY ACCOMPANIES DENIALS OF EQUAL ACCESS TO PUBLIC ESTABLISHMENTS. THE COMMITTEE ALSO NOTED THAT THE OBJECTIVE COULD BE ACHIEVED BY CONGRESSIONAL ACTION BASED ON THE COMMERCE POWER OF THE UNITED STATES CONSTITUTION. JUSTICE CLARK SAID:

> OUR STUDY OF THE LEGISLATIVE RECORD MADE IN THE LIGHT OF PRIOR CASES HAS BROUGHT US TO THE CONCLUSION THAT CONGRESS POSSESSED AMPLY POWER IN THIS REGARD, AND WE HAVE THEREFORE NOT CONSIDERED THE OTHER GROUNDS RELIED UPON. THIS IS NOT TO SAY THAT THE REMAINING AUTHORITY UPON WHICH IT ACTED WAS NOT ADEQUATE A QUESTION UPON WHICH WE DO NOT PASS BUT MERELY THAT SINCE THE COMMERCE POWER IS SUFFICIENT FOR OUR DECISION HERE WE HAVE CONSIDERED IT ALONE. NOR IS SECTION 201 (D) OR 202 HAVING TO DO WITH STATE ACTION INVOLVED HERE AND WE DO NOT PASS UPON THOSE SECTIONS.[7]

SECTION II OF THE CIVIL RIGHTS ACT OF 1964 WAS CONSIDERED AS THE MOST CONTROVERSIAL SECTION. IN 1875 THE CONGRESS PASSED A

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[7]THOMAS EMERSON, DAVID HABER, AND NORMAN DORSEN ED., POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (BOSTON: LITTLE, BROWN & CO., 1967, PP. 2138-2139

SIMILAR ACT WHICH BROADLY PRESCRIBED DISCRIMINATION IN INNS, PUBLIC CONVEYANCES ON LAND OR WATER, THEATERS AND OTHER PLACES OF PUBLIC AMUSEMENTS WITHOUT LIMITING THE CATEGORIES OF AFFECTED BUSINESSES TO THOSE IMPINGING UPON INTERSTATE COMMERCE. THE CIVIL RIGHTS ACT OF 1875 WAS DECLARED UNCONSTITUTIONAL IN THE FAMOUS CIVIL RIGHTS CASES. JUSTICE CLARK CONCLUDED IN THE COURT'S OPINION THAT:

> THE CIVIL RIGHTS CASES HAVE NO RELEVANCE TO THE BASIS OF DECISION HERE WHERE THE ACT NOT ONLY EXPLICITLY RELIES UPON THE COMMERCE POWER, BUT THE RECORD IS FILLED WITH TESTIMONY OF OBSTRUCTIONS AND RESTRAINTS RESULTING FROM THE DISCRIMINATION FOUND TO BE EXISTING.[8]

IN THE CONCLUDING REMARKS OF THE COURT'S OPINION, JUSTICE CLARK SAID:

> WE THEREFORE CONCLUDE THAT THE ACTION OF THE CONGRESS IN THE ADOPTION OF THE ACT AS APPLIED HERE TO A MOTEL WHICH CONCEDELY SERVES INTERSTATE TRAVELERS IS WITHIN THE POWER GRANTED IT BY THE COMMERCE CLAUSE OF THE CONSTITUTION... IT MAY BE ARGUED THAT CONGRESS COULD HAVE PURSUED OTHER METHODS TO ELIMINATE THE OBSTRUCTIONS IT FOUND IN INTERSTATE COMMERCE CAUSED BY RACIAL DISCRIMINATION. BUT THIS IS A MATTER OF POLICY THAT RESTS ENTIRELY WITH THE CONGRESS NOT WITH THE COURTS. IT IS SUBJECT ONLY TO ONE CAVEAT - THAT THE MEANS CHOSEN BY IT MUST BE REASONABLY ADAPTED TO THE END PERMITTED BY THE CONSTITUTION. WE CANNOT SAY THAT ITS CHOICE HERE WAS NOT SO ADAPTED. THE CONSTITUTION REQUIRES NO MORE.[9]

IT IS VERY EVIDENT THAT THE COURT HAD SOUGHT TO ELIMINATE ANOTHER ONE OF THE BADGES OF SERVITUDE WHICH THE SUPREME COURT OF THE 1870'S AND 1880'S HELPED TO INSTITUTIONALIZE IN ITS DECISION DESIGNED TO

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8 379 U. S. 241

9 IBID

RESTRICT THE SUBSTANTIVE POWER IN THE 13-15 AMENDMENTS OF THE CONSTITUTION. THE COURT SEEM TO BE PASSING THE BURDEN OF RESPONSIBILITY TO CONGRESS. THE MANNER IN WHICH THE COURT TOOK TO DEAL WITH A CONTEMPORARY BADGE OF SERVITUDE IS SIMPLY ANOTHER ILLUSTRATION OF THE WORKINGS OF THE ETHICAL VIEWS OF SUPPORTERS OF INSTITUTIONAL RACISM.[10]

EVEN IN 1964, THE BLACK MAN WAS STILL REGARDED AS A PIECE OF PROPERTY. JUSTICE DOUGLAS REALIZED THIS FACT IN HIS CONCURRING OPINION. HE SAID:

> IT IS RATHER MY BELIEF THAT THE RIGHT OF PEOPLE TO BE FREE OF STATE ACTION THAT DISCRIMINATES AGAINST THEM BECAUSE OF RACE...OCCUPIES A MORE PROTECTED POSITION IN OUR CONSTITUTIONAL SYSTEM THAN DOES THE MOVEMENT OF CATTLE.[11]

IN THE LIGHT OF THIS FACT, THIS WRITER CONTENDS THAT THE SUPREME COURT HAS A RESPONSIBILITY TO TAKE AFFIRMATIVE ACTION TO ELIMINATE ALL VESTIGES OF THE BADGES OF INSTITUTIONAL RACISM IN AMERICAN LAW WHICH THEY HAVE INSTITUTIONALLY, UNKNOWINGLY AND KNOWINGLY SUPPORTED. THE HONORABLE CHARLES BLACK WAS RIGHT WHEN HE SAID:

> THE MOST IMPORTANT SINGLE TASK AMERICAN LAW MUST ADDRESS ITSELF IS THE TASK OF ERADICATING RACISM. THE STRATEGY OF THIS WAR MUST ADDRESS ITSELF TO THE STATE ACTION DOCTRINE AND TO THE STANDARDIZED ERRORS OF ATTITUDES WHICH GO WITH THAT DOCTRINE.[12]

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[10] SEE MELVILLE NIMMER, "A PROPOSAL FOR JUDICIAL VALIDATION OF A PREVIOUSLY UNCONSTITUTIONAL LAW: THE CIVIL RIGHTS ACT OF 1875" 65 COLUMBIA UNIVERSITY LAW REVIEW 1394 (1965)

[11] 379 U. S. 241

[12] CHARLES BLACK. "STATE ACTION EQUAL PROTECTION AND CALIFORNIA 14" (81 HARVARD LAW REVIEW 69 (1969)

THE TIME HAS COME FOR US TO DISCONTINUE OUR ATTEMPTS TO FIND THE LIMITATIONS OF STATE ACTION. HAROLD HOROWILTZ SAID IN "THE MISLEADING SEARCH FOR STATE ACTION" 30 CALIFORNIA LAW REVIEW 208 (1957) THAT STATE ACTION ALWAYS ATTRIBUTES SOME LEGAL SIGNIFICANCE TO PRIVATE ACTION. IN EVERY CASE THE ANALYSIS OF THE SITUATION ONE SHOULD CONCERN HIMSELF NOT WITH THE PRESENCE OF STATE ACTION BUT WITH THE CONSTITUTIONALITY OF THAT STATE ACTION WHICH IS ALWAYS PRESENT.

THE COURT HAS ON OCCASION TRIED TO EVADE THE REAL ISSUE OF THE SITUATION BY TRYING TO SHOW THE DIFFERENCE BETWEEN THE VARIOUS FORMS OF RIGHTS. AS MEN BECOME MORE DEPENDENT UPON OTHERS THE LINES OF DISTINCTION DRAWS NARROWER. CHARLES BLACK ONCE SAID THAT THE LAW IS A RESOURCE TO BE HUSBANDED AND STATE ACTION CAN AT ANY ONE TIME ACT IN EVERY IMAGINABLE WAY TO EXTEND EQUAL PROTECTION. IT IS BARELY POSSIBLE FOR THE STATE TO BE NEUTRAL AND WHEN IT DOES OCCUR TENDS TO ISOLATE RACIAL DISCRIMINATION FOR STATE POWER.[13] THE EXPANSION OF STATE FOSTERING, ENFORCING AND EVEN TOLERATING ACTION DOES NOT HAVE TO MEAN THAT THE 14TH AMENDMENT IS TO REGULATE THE GENUINELY PRIVATE CONCERNS OF MAN.

THE INTEREST OF THE PUBLIC SHOULD BE VIEWED MORE IN THE MANNER IT CAN BE UTILIZED TO REALIZE THE IDEAL OF THE AMERICAN CONSTITUTIONAL COMMITMENT TO THE AMERICAN CREED. THE COURT HAS ON OCCASION MOVED IN THE RIGHT DIRECTION IN THIS REGARD. THE SUPREME COURT SAID IN MARSH V ALABAMA (326 U. S. 501) (1946) THAT THE MORE AN OWNER OPENS UP HIS PROPERTY FOR USE BY RIGHT IN GENERAL THE MORE A PERSON OR ORGANIZATION

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[13] 81 HARVARD LAW REVIEW 69 (1969)

OPENS UP HIS OR THEIR PROPERTY THE GREATER THE RIGHTS OF THE MEMBERS OF THE LARGER PLURALISTIC COMMUNITY WOULD HAVE IN SUCH A PROPERTY. CONSEQUENTLY, ONCE A BUSINESS HAS OPENED ITSELF UP TO THE PUBLIC IT IS THEN DUTY BOUND TO LET THE PUBLIC PLAY A JUST ROLE IN ITS OPERATION. THUS, THE BLACK MAN SHOULD HAVE A FAIR SHARE IN ALL LEVELS OF THE OPERATIONS OF A PRIVATE CONCERN WHICH HAS A PUBLIC TRUST.

IN THE CIVIL RIGHTS CASES (109 U. S. - 1883) JUSTICE HARLAN REFERRED TO THE MUNN V ILLINOIS CASE IN HIS DISSENT. THE COURT SAID IN THE MUNN CASE THAT PROPERTY DOES BECOME CLOTHED WITH PUBLIC INTEREST WHEN USED IN A MANNER TO MAKE IT OF PUBLIC CONSEQUENCE AND AFFECTS THE COMMUNITY AT LARGE. IT IS IMPLICIT IN THIS CASE THAT WHEN ONE DEVOTES HIS PROPERTY TO USE IN WHICH THE PUBLIC HAS AN INTEREST HE IS IN AFFECT GRANTING TO THE PUBLIC AN INTEREST IN THAT USE AND MUST SUBMIT TO BEING CONTROLLED BY THE PUBLIC FOR THE COMMON GOOD TO THE EXTENT OF INTEREST HE HAS THUS CREATED FOR THE PUBLIC.

IN A LATTER CASE BURTON V WILMINGTON PARKING AUTHORITY[14] THE SUPREME COURT SAID THAT THE PUBLIC INTEREST WAS INVOLVED IN THE PRIVATE INTEREST WAS TO THE EXTENT OF ANY SIGNIFICANT INVOLVEMENT OF THE STATE IN PRIVATE ACTION. IT HAS OFTEN BEEN SAID THAT PRIVATE DISCRIMINATION IS A CUSTOMARY PRACTICE WHICH THE GOVERNMENT LACK THE POWER TO REGULATE. THE AUTHOR OF "CITIZENS IN PROTEST" SAID THAT IN PAUL V VIRGINIA THE SUPREME COURT SAID ARTICLE 4 SECTION 2 WAS

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[14] 365 U. S. 715 (1960)

DESIGNED TO PLACE CITIZENS ON EACH STATE ON THE SAME FOOTING WITH CITIZENS OF OTHER STATES. THUS, THE STATE CITIZENS OBTAINED THE RIGHTS TO BUY AND SELL PROPERTY OF EVERY KIND AND DESCRIPTION.[15]

THE AMERICAN SLAVE POPULATION WAS OUTSIDE THE REALM OF CITIZENSHIP SAID THE COURT IN CORFIELD V CORYELL.[16] IT IS IMPLIED HERE THAT CUSTOM GRANTED THE RIGHTS OF CITIZENSHIP TO THE WHITE MAN, YET IT TOOK THE 14TH AMENDMENT TO THE CONSTITUTION TO MAKE IT POSSIBLE FOR THE BLACK MAN TO OBTAIN HIS CITIZENSHIP. THUS, IN ORDER FOR THE BLACK MAN TO OBTAIN WHAT IS CUSTOMARY FOR THE WHITE MAN, THE FEDERAL ARM OF THE GOVERNMENT MUST MANIFEST ITSELF TO TRANSFORM THE CUSTOMARY PARCTICE OF DISCRIMINATION AGAINST THE BLACK MAN TO ASSURE EQUAL OPPORTUNITY OF ALL CITIZENS.

YET, DURING THE YEARS 1873-1883, THE SUPREME COURT SOUGHT TO DISHONOR THIS AIM AS IT SOUGHT TO SUPPORT THE CAPITALISTIC EXPANSION OF AMERICAN BUSINESS ENTERPRISES. THE COURT IN THE SLAUGHTER HOUSE CASE ACKNOWLEDGES THE INTENDED PURPOSE OF THE 14TH AMENDMENT, BUT USED THIS CASE TO SOLVE THE PROBLEMS OF NATIONAL VERSUS STATE PROTECTION OF ECONOMIC INTEREST RATHER THAN GIVE ADDED SUPPORT TO THE NEED TO PROTECT THE FUNDAMENTAL RIGHTS OF EX-SLAVES. "BY ALLOCATING THE PROTECTION OF FUNDAMENTAL RIGHTS TO STATE GOVERNMENTS, THE PROTECTION OF AFRO-AMERICANS LAY IN THE HANDS OF THE STATES."[17]

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[15] 6 HOWARD LAW JOURNAL 187 JUNE (1960)

[16] LOIS MORELAND. WHITE RACISM AND THE LAW (COLUMBUS: CHARLES E. MERRITT PUBLISHING CO., 1970) P. 32.

[17] IBID. PP. 78-79

In Ex Parte Virginia, the court held that individual interference with human rights does not come within the definition of state action. When an individual violates the rights of another person then the injured party could seek redress from the state. This course of action may have been alright if the persons involved were White but the Black man especially in the South could not expect to get justice.

A classic illustration of American Justice could be seen by Charles Warren's often quoted words about the court decisions on the Reconstruction Era's seven Act and the 13-15 Amendments. His words are impregnated with the venon of institutional racism when he said:

> .....There can be no question that the decisions in these cases were most fortunate. They largely eliminated from national politics the Negro question which had so long embittered congressional debates; they relegated the burden and the duty of protecting the Negro to the States, to whom they properly belonged; and they served to restore confidence in the national court in the Southern States.[18]

The Supreme Court has been forced by the imperatives of the twentieth Century to take a serious look at the effects of racist behavior on people of color. In spite of the actions of the court at the end of the 19th Century, the Court at the beginning of the 20th Century began to chip away the racist separate but equal doctrine in the Plessy v Ferguson. In fact it began by using the equal protection clause to "infuse equality as a value in race relation." The fact that Congress under pressure of the times passed the Civil Rights Act of 1964. Title II of that law is similar to the public

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[18] Ibid p. 81

ACCOMMODATION ACT OF 1875. YET THE COURT REFUSED TO GRANT TO THE BLACK AMERICAN ITS LONG DENIED RIGHTS OF FULL CITIZENSHIP; BUT STILL REGARDED THE BLACK AMERICANS ONLY IN COMMERCIAL TERMS. FOR THE COURT ILLUSTRATED THIS FACT WHEN IT VALIDATED TITLE II UNDER AUTHORITY OF THE COMMERCE CLAUSE IN HEART OF ATLANTA MOTEL, INC. V UNITED STATES. THE PROBLEM IN THIS CASE REALLY DEALT WITH THE CONSTITUTIONAL STATUS OF HUMAN BEING, NOT CATTLE.[19]

IF THE COURT HAD NOT DECIDED THE CASE SOLELY ON THE COMMERCE CLAUSE, THEN THE COMPANION CASES KATZENBACH V MCCLUNG,[20] HAMM V CITY OF ROCK HILL.[21] WOULD NOT HAVE BEEN NECESSARY. THE KATZENBACH V MCCLUNG CASE DEALT WITH A FAMILY OWNED RESTAURANT. THE COURT FOUND THAT A SUBSTANTIAL PROPORTION OF THE FOOD SERVED IN THE RESTAURANT HAD MOVED IN INTERSTATE COMMERCE AND THEREFORE CAME UNDER THE ACT.

THE THIRD CASE TO BE CONSIDERED IS HAMM V CITY OF ROCK HILL. THE COURT VACATED STATE COURT CONVICTIONS UNDER STATE TRESPASS LAWS FOR PEACEFUL SIT-INS AT LUNCH COUNTERS. THIS CASE DEALT WITH A SITUATION THAT TOOK PLACE BEFORE THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964, BUT THE CASE WAS STILL PENDING IN COURTS. THERE IS ALSO DICTUM IN THE COURT OPINION BY JUSTICE CLARK WHICH POINTS OUT THE INSTITUTIONALIZE EVASIVE TACTICS WHICH ARE EMPLOYED BY THE COURTS. JUSTICE CLARK SAID:

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[19] IBID PP. 3-4

[20] 379 U. S. 294

[21] 379 U. S. 306

> WHERE CONGRESS SETS OUT TO REGULATE A SITUATION WITHIN ITS POWER, THE CONSTITUTION AFFORDS IT A WIDE CHOICE OF REMEDIES. THIS BEING TRUE, THE ONLY QUESTION REMAINING IS WHETHER CONGRESS EXERCISED ITS POWER IN THE ACT TO ABATE THE PROSECUTIONS HERE. IF WE HELD THAT IT DID NOT WE WOULD THEN HAVE TO PASS ON THE CONSTITUTIONAL QUESTION OF WHETHER THE FOURTEENTH AMENDMENT WITHOUT THE BENEFIT OF THE CIVIL RIGHTS ACTS, OPERATES ON ITS OWN TO BAR CRIMINAL TRESPASS CONVICTIONS, WHERE, AS HERE THEY ARE USED TO ENFORCE A PATTERN OF RACIAL DISCRIMINATION.... SOME OF THE JUSTICES JOINING THIS OPINION BELIEVE THAT THE FOURTEENTH AMENDMENT DOES SO OPERATE...SINCE WE HAVE FOUND CONGRESS HAS AMPLE POWER TO EXTEND THE STATUTE TO PENDING CONVICTIONS THAT WE ARREARS THAT QUESTION BY FAVORING AN INTERPRETATION OF THE STATUTE WHICH RENDERS A CONSTITUTIONAL DECISION UNNECESSARY.[23]

AGAIN THE COURT HAD FAILED TO REALLY FACE THE TRUE ISSUES. THIS INSTITUTIONAL PRACTICE HAS PROLONGED THE DAY WHEN EQUAL RIGHTS FOR ALL WILL BECOME A REALITY INSTEAD OF A GOAL FOR BLACKS. THE COURT DID NOT CONSIDER THE FATE OF THOSE BLACK PERSONS WHO HAD BEEN UNJUSTLY SENTENCED TO SERVE TIME IN JAIL FOR A CONSTITUTIONALLY DENIED RIGHT SIMPLY BECAUSE THE PARTY IN QUESTION WAS BLACK.

ANOTHER CHAPTER IN THE STRUGGLE FOR JUSTICE FOR THE BLACK MAN WAS WRITTEN IN 1965 WITH THE PASSAGE OF THE 1965 VOTING RIGHTS ACT. IN AN ATTEMPT TO GET THE COURT TO DECLARE THE MAIN PORTION OF THE ACT UNCONSTITUTIONAL, THE STATE OF SOUTH CAROLINA FILED A FEDERAL SUIT TO BRING THE ISSUES BEFORE THE SUPREME COURT. THE SUIT SOUGHT TO ENJOIN THE ATTORNEY GENERAL NICHOLAS DEB KATZENBACK FROM ENFORCING THE ACT ON GROUNDS THAT THE LAW UNCONSTITUTIONALLY INVADED THE STATES RIGHT TO SET VOTER QUALIFICATIONS.[24] IN AN UNANIMOUS COURT

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[23] 379 U. S. 306

[24] 383 U. S. 301 (1966)

OPINION WRITTEN BY CHIEF JUSTICE WARREN, THE COURT SAID THAT AFTER NEARLY A CENTURY OF WIDE SPREAD RESISTANCE TO THE 15TH AMENDMENT, CONGRESS HAD MARSHALLED AN ARRAY OF POTENT WEAPONS AGAINST THE EVIL, WITH THE AUTHORITY OF THE ATTORNEY GENERAL TO EMPLOY THEM EFFECTIVELY. JUSTICE WARREN SAID THAT CONGRESS COULD USE ANY RATIONAL MEANS TO EFFECTUATE THE CONSTITUTIONAL PROHIBITION OF RACIAL DISCRIMINATION IN VOTING. CONSEQUENTLY, THE COURT DENIED THE BILL OF COMPLAINT.

ANOTHER SIGNIFICANT CASE IN WHICH THE COURT CONSIDERED THE CONSTITUTIONALITY OF THE 1965 VOTING RIGHTS ACT WAS KATZENBACH V MORGAN.[25] THIS CASE DEALT WITH WHETHER OR NOT THE LITERACY TEST OF NEW YORK CONFLICTED WITH SECTION 4 (E) OF THE 1965 VOTING RIGHTS ACT.[26]

THE SUPREME COURT SAID THAT SECTION 4 (E) IS APPROPRIATE LEGISLATION TO ENFORCE THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT.

AGAIN THE COURT HAS HELPED TO CHIP AWAY A LITTLE MORE OF THE VESTIGES OF SLAVERY. THE SUPREME COURT HAS CONTINUED TO UTILIZE ITS

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[25] 383 U. S. 301 (1966)

[26] THIS SECTION DECLARED: CONGRESS HEREBY DECLARED THAT TO SECURE THE RIGHTS UNDER THE 14TH AMENDMENT OF PERSONS EDUCATION IN AMERICAN FLAG SCHOOLS IN WHICH THE PREDOMINANT CLASSROOM LANGUAGE WAS OTHER THAN ENGLISH, IT IS NECESSARY TO PROHIBIT THE STATES FROM CONDITIONING THE RIGHT TO VOTE OF SUCH PERSONS OR ABILITY TO READ, WRITE, UNDERSTAND OR INTERPRET ANY MATTER IN THE ENGLISH LANGUAGE. (2) NO PERSON WHO DEMONSTRATES THAT HE HAS SUCCESSFULLY COMPLETED THE SIXTH PRIMARY GRADES IN A PUBLIC SCHOOL IN, OR A PRIVATE SCHOOL ACCREDITED BY ANY STATE OR TERRITORY WAS OTHER THAN ENGLISH, SHALL BE DENIED THE RIGHT TO VOTE IN ANY FEDERAL, STATE OR LOCAL ELECTION BECAUSE OF HIS INABILITY TO READ, WRITE, UNDERSTAND OR INTERPRET ANY MATTER IN THE ENGLISH LANGUAGE HE SHALL DEMONSTRATE THAT HE HAS SUCCESSFULLY COMPLETED AN EQUIVALENT LEVEL OF EDUCATION IN A PUBLIC SCHOOL IN ANY STATE TERRITORY THE DISTRICT OF COLUMBIA....IN WHICH THE PREDOMINANT CLASSROOM LANGUAGE WAS OTHER THAN ENGLISH.

INSTITUTIONALIZED PREJUDICES. IN ADDITION TO THE RIGHT TO VOTE THE BLACK MAN HAS WANTED TO BE ABLE TO HAVE THE RIGHT TO DECIDE WHERE HE CAN BUY A DECENT HOME. THE COURTS HAVE HELPED TO CREATE THIS PROBLEM. IN 1968, THE SUPREME COURT TOOK A STEP FORWARD IN THE AREA OF HOUSING ONLY AFTER CONGRESS HAD PASSED THE COMPREHENSIVE 1968 HOUSING ACT.

THE CONGRESSIONAL HOUSING ACT OF 1968 PROHIBITED DISCRIMINATION IN THE SALE OR RENTAL OF ABOUT 80 PER CENT OF ALL HOUSING. MOST OF THE HOUSING BUILT WITH FEDERAL ASSISTANCE WAS COVERED BY THE ACT. PRIVATE OWNERS SELLING OR RENTING THEIR HOUSE WITHOUT THE SERVICES OF A REAL ESTATE AGENT OR BROKER WERE EXEMPTED. THE PROHIBITION AGAINST DISCRIMINATION ALSO APPLIED TO FINANCING AND BROKERAGE SERVICES.[27]

DURING THE PERIOD FROM THE TIME OF THE PASSAGE OF THE ACT AND THE CLOSING OF THE 1967-1968 SUPREME COURT SESSIONS IN JUNE OF 1968, THE COURT DID NOT HAVE TO DETERMINE THE CONSTITUTIONALITY OF THE ACT. HOWEVER, THE COURT DECIDED TO REACTIVATE A 1868 HOUSING ACT. THE QUESTION PRESENTED TO THE COURT WAS TO DETERMINE THE SCOPE AND THE CONSTITUTIONALITY OF THIS ACT OF CONGRESS WHICH DECLARED:

> ALL CITIZENS IN THE UNITED STATES SHALL HAVE THE SAME RIGHTS AS IS ENJOYED BY WHITES THEREOF TO INHERIT, PURCHASE, LEASE, SELL, HOLD, AND CONVEY REAL AND PERSONAL PROPERTY.

THIS WAS THE JONES V MAYER CASE.[28] THE COURT DECLARED THAT CONGRESS HAS AUTHORITY TO ENFORCE THE 13TH AMENDMENT BY APPROPRIATE LEGISLATION WHICH INCLUDED POWER TO ELIMINATE RACIAL BARRIERS

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[27] REVOLUTION IN CIVIL RIGHTS P. 84

[28] 392 U. S. 409

ACQUISITIVE, REAL AND PERSONAL PROPERTY. IN THIS CASE THE COURT ADMITTED THAT THE STATE HAS AUTHORITY TO ERADICATE ALL OF THE BADGES OF SLAVERY. THIS IS REALLY WHAT JUSTICE DOUGLAS SAID IN HIS CONCURRING OPINION THAT:

> ENABLING A NEGRO TO BUY AND SELL REAL AND PERSONAL PROPERTY IS A REMOVAL OF ONE OF MANY BADGES OF SLAVERY... THE TRUE CURSE OF SLAVERY IS NOT WHAT IT DID TO THE BLACK MAN, BUT WHAT IT HAS DONE TO THE WHITE MAN. FOR THE EXISTANCE OF THE INSTITUTION PROTECTED THE NOTION THAT THE WHITE MAN WAS OF SUPERIOR CHARACTER, INTELLIGENCE AND MORALITY....SOME BADGES OF SLAVERY REMAIN TODAY WHILE THE INSTITUTION HAS REMAINED IN THE MINDS AND HEARTS OF MANY WHITE MAN.[29]

ONE COULD NOT BE CERTAIN WHY THE COURT DECIDED TO TAKE THIS FORWARD STEP AT THE TIME THAT IT DID. IT MAY HAVE FELT THAT THE TEMPERMENT OF THE TIME DEMANDED SUCH A COURSE OF ACTION. IT IS POSSIBLE THAT THE DEATH OF DR. MARTIN KING AND THE SUBSEQUENT RIOTS MAY HAVE INFLUENCED THE COURT AND ALSO THIS COURSE OF ACTION MAY HAVE BEEN DUE TO THE NATURE OF THE PERSONNEL ON THE COURT. EITHER ONE OR A COMBINATION OF THE FOREMENTIONED REASONS MAY HAVE PROMPTED THE COURT TO ACT.

A KEY FIGURE DURING THE CRITICAL PERIOD OF THE 1960'S WAS JUSTICE HUGO BLACK. PRIOR TO THE GREAT EFFORTS OF BLACKS TO OBTAIN THEIR OVERDUE RIGHTS IN THE MID 1960'S JUSTICE BLACK WAS REGARDED AS THE PROTECTOR OF THE OPPRESSED PEOPLE IN AMERICAN SOCIETY. YET WHEN BLACKS BEGAN TO ACT AS A BODY IN UNITY FOR JUSTICE, SUPREME COURT JUSTICE BLACK BEGAN TO BECOME CONSERVATIVE IN THE AREA OF CIVIL RIGHTS. THE NEXT CHAPTER WILL BE DEVOTED TO JUSTICE BLACK'S ACTION ON THE COURT AFTER 1964.

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[29] IBID

CHAPTER IV

JUSTICE HUGO BLACK AND THE BLACK MAN SINCE 1964

THE BLACK PEOPLE OF THE UNITED STATES OF AMERICA ARE QUASI-CITIZENS WHO WERE TOLD AFTER THE CIVIL WAR THAT THEY WERE FREE PEOPLE. YET, IN 1964, BLACK AMERICANS HAVE YET TO OBTAIN THE RIGHT TO EAT, TO WORK, AND SLEEP WHERE THEY PLEASE LIKE ANY OTHER AMERICAN CITIZEN. THE SUPREME COURT HAS ON OCCASIONS DEFENDED THE RIGHTS OF BLACK AMERICANS BUT HAS BEEN TRADITIONALLY THE GUARDIAN OF THE ECONOMIC RIGHTS OF SPECIAL INTEREST GROUPS INSTEAD OF THE RIGHTS OF THE COMMON MAN. IN 1922 A FEDERAL DISTRICT COURT JUDGE GAVE AN ADEQUATE DESCRIPTION OF OUR POLITICAL INSTITUTIONS WHEN HE SAID:

> OF THE THREE FUNDAMENTAL PRINCIPLES WHICH UNDER LIE GOVERNMENT, AND FOR WHICH GOVERNMENT EXISTS, THE PROTECTION OF LIFE, LIBERTY AND PROPERTY, THE CHIEF OF THESE IS PROPERTY.[1]

THE DECISIONS OF THE SUPREME COURT OF THE 1960'S REFLECT A GREATER CONCERN FOR THE RIGHTS OF THE INDIVIDUALS. THE 1935-36 SUPREME COURT RENDERED ONLY TWO OUT OF ONE HUNDRED AND SIXTY DECISIONS THAT DEALT WITH CIVIL RIGHTS AND CIVIL LIBERTIES WHILE THE WARREN COURT OF 1960-62 GAVE OPINIONS IN MORE THAN 135 CASES DEALING WITH CIVIL RIGHTS. THIS CHANGE IN ATTITUDE ON THE PART OF THE COURT MAY BE DUE TO SEVERAL FACTORS, LIKE COMPOSITION OF THE

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[1]ALPHEUS THOMAS MASON. THE SUPREME COURT FROM TAFT TO WARREN: (BATON ROUGE: LOUISIANA STATE UNIVERSITY PRESS, 1968,) PP. 267-268

SUPREME COURT OPINION ON THE RIGHTS OF BLACK CITIZENS, THE POLITICAL ACTIVISM OF AMERICAN BLACKS TO OBTAIN THEIR RIGHTS, THE ATTITUDINAL CHANGES OF THE AMERICAN WHITE POPULATION ABOUT THE BLACK AMERICANS. EACH OF THESE FACTORS PLAYED A SIGNIFICANT ROLE IN BRINGING ABOUT THESE CHANGES. YET, THE FACT THAT THE RIGHTS OF A HUMAN BEING EVIDENTLY HAS PLAYED AND IS PLAYING A GREATER DEGREE ON AN HIERARCHY OF RIGHTS THAN IN YEARS PAST. THE FEDERAL JUDGE INDICTMENT HAS MERIT IN OUR SYSTEM OF GOVERNMENT. ATTENTION SHOULD NOW BE DEVOTED TO AN ANALYSIS OF JUSTICE HUGO BLACK WHO WAS A MEMBER OF THE COURT DURING THESE TRANSITIONAL TIMES.

THE SUPREME COURT IS A POLITICAL BODY WHICH HAS ONLY SUPPORTED MINORITY RIGHTS WHEN IT WAS POLITICALLY FEASIBLE. PROFESSOR ROBERT DAHL CONTENDED THAT "THERE IS NO CASE ON RECORD IN WHICH THE SUPREME COURT HAS DECLARED A FEDERAL LAW UNCONSTITUTIONAL BECAUSE IT INTERFERED WITH FREEDOM OF RELIGION, SPEECH, PRESS, OR ASSEMBLY."[2] HE BELIEVES THE POLICY VIEWS OF THE MAJORITY MEMBERS OF THE COURT ARE NEVER FOR LONG OUT OF LINE WITH THE POLICY VIEWS THAT ARE HELD BY THE MAJORITY OF THE LAWMAKERS IN THE UNITED STATES.[3] THE PRESIDENT OF THE UNITED STATES TENDS TO APPOINT AN AVERAGE OF ONE JUSTICE EVERY TWENTY-TWO MONTHS. SINCE THE SUPREME COURT IS A POLITICAL BODY, IT HAS RESPONDED TO THE POLITICAL PRESSURES OF THE TIME WHEN THE WARREN COURT BEGAN TO CONSIDER CIVIL RIGHTS CASES.

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[2] LEWIS A. FROMAN. PEOPLE AND POLITICS - AN ANALYSIS OF THE AMERICAN POLITICAL SYSTEM. (ENCLEWOOD CLIFFS: PRENTICE-HALL, INC., 1963) P. 92

[3] IBID

In this chapter this writer will consider the decisions of Justice Hugo Black. He has been a member of the court since 1937. He was a member of the Supreme Court in the late 1930's when less than one per cent of its cases dealt with civil liberties. He was still a member of the Court in 1964 when the majority of the Court were interested in defending the rights of minorities. Justice Black, prior to 1964, was noted as a defender of the rights of minorities. The special focus of this writer in this chapter will be to consider Justice Black's view of property rights and constitutional freedom against the Black man's struggle for full citizenship rights.

Justice Hugo Black has been one of the most interesting yet puzzling of the Justices on the Supreme Court. He is a Southern Justice from Alabama who helped to spearhead the Supreme Court to unite behind the Brown v Board of Education of Topeka decision. He was viewed as a traitor to the Southern way of life for his part in rendering this decree. In addition to personal criticism of him, his family was also scorned. Justice Black's son Hugo, Jr. was driven from his law practice in Alabama and had to relocate in Florida. Even though Justice Black had been denounced as a traitor to the glory of the South, he still regarded himself as a true Southerner. In fact he maintained a policy that at least one of his law clerks must be from Alabama.[4] In the light of the fact that

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[4] John Frank. Warren Court, (New York, MacMillan Company 1964) p. 39

UP TO 1964, JUSTICE BLACK'S ACTION ON THE SUPREME COURT HAS EXPRESSED A DEGREE OF SENSITIVITY TO THE CONSTITUTIONAL NEEDS AND RIGHTS OF BLACK PEOPLE, HIS ACTIONS SINCE 1964 ARE DIFFICULT TO UNDERSTAND. PRIOR TO 1964 JUSTICE BLACK HAD PLAYED A SIGNIFICANT ROLE IN THE DESEGREGATION OF PUBLIC SCHOOL CASES, LED IN THE MOVEMENT TO APPLY THE BILL OF RIGHTS TO THE STATE LEGISLATURES AND CONGRESS. SINCE 1964, THERE HAS BEEN A CHANGE IN THE PHILOSOPHY OF HUGO BLACK TOWARD THE BLACK MAN OR THERE HAD REALLY BEEN A SUDDEN AWAKENING OF A SOUTHERN RACIST WHO HAS DECIDED TO RETURN TO THE FOLD. THE CHANGE IN THE POSITION OF JUSTICE BLACK IS ANALYZED IN A STUDY OF HIS VOTING PATTERNS AND DECISIONS ON CASES DIRECTLY INVOLVING BLACK PEOPLE. THESE CASES WERE DECIDED BETWEEN THE 1964 AND 1967 TERMS OF THE SUPREME COURT.

THE FIRST INKLING OF THE NEW PICTURE OF MR. BLACK TOWARD BLACK AMERICANS, AS A MINORITY GROUP WHO HAVE ACTIVELY SOUGHT EQUAL RIGHTS FOR ALL AMERICANS, CAME WITH HIS DISSENT IN BELL V MARYLAND.[5] THIS WAS THE FIRST WRITTEN OPINION OF JUSTICE BLACK SINCE THE BEGINNING IN 1961 OF THE SIT-IN MOVEMENT IN THE SOUTH. THE ACTION OF JUSTICE BLACK IN THIS DECISION AND IN OTHER DECISIONS STRESSES THE IMPORTANCE OF THE PRIORITY OF PROPERTY RIGHTS OVER HUMAN RIGHTS.

IN BELL V MARYLAND JUSTICE BLACK PRESENTED AN INTERESTING BUT RATHER RACIST ARGUMENT. THIS CASE INVOLVED A GROUP OF SIT-IN DEMONSTRATORS AT HOOPER'S RESTAURANT IN BALTIMORE, MARYLAND, WHO FAILED

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[5] 378 U. S. 226 (1964)

TO LEAVE THE RESTAURANT, WHEN REQUESTED BY THE OWNER. AS A RESULT, THE DEMONSTRATORS WERE ARRESTED FOR VIOLATION OF THE NO-TRESPASS LAW OF THE STATE. THESE PERSONS WERE CONVICTED AND APPEALED THEIR CONVICTIONS. BETWEEN THE ARREST AND THE PRESENTATION OF THE CASE BEFORE THE SUPREME COURT THE STATE OF MARYLAND PASSED A PUBLIC ACCOMMODATION LAW WHICH MADE IT A STATE RIGHT FOR THE DEMONSTRATORS TO EAT IN HOOPER'S RESTAURANT. THIS CASE PRESENTED THE COURT WITH AN EXCELLENT OPPORTUNITY TO DECIDE THAT THE DEMONSTRATORS HAD A FEDERAL RIGHT TO EAT IN ANY PUBLIC RESTAURANT. SINCE CONGRESS WAS CONSIDERING PASSING THE 1964 CIVIL RIGHTS ACT, THE COURT DECIDED AGAIN TO AVOID THE SUBSTANTIVE ISSUES BY TAKING ITS TRADITIONAL METHOD OF RELYING ON STATE LAW WHEN POSSIBLE INSTEAD OF RULING ON CONSTITUTIONAL ISSUES. THE COURT DECIDED TO REMAND THE CASE TO THE LOWER COURT TO RECONSIDER THE CASE IN THE LIGHT OF THE NEW STATE PUBLIC ACCOMODATION LAW.[6]

JUSTICE BLACK WROTE IN THIS CASE HIS FIRST OPINION IN A SIT-IN CASE. JUSTICE BLACK DID NOT FEEL THE COURT SHOULD HAVE REMANDED THE CASE TO THE LOWER COURT. HE PRESENTED A RATHER STRONG ARGUMENT FOR THE RIGHT OF THE PROPERTY OWNER TO DO AS HE PLEASED WITH HIS PROPERTY. IN HIS DISSENT THERE WAS CERTAIN DICTUM USED BY BLACK TO BRING OUT RACISM IN HIS BELIEFS: SECTION 1 OF THE FOURTEENTH AMENDMENT PROVIDES IN PART:

> NO STATE SHALL...DEPRIVE ANY PERSON OF LIFE, LIBERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON

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[6] IBID

> WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS. THIS SECTION OF THE AMENDMENT, UNLIKE OTHER SECTIONS, IS A PROHIBITION AGAINST CERTAIN CONDUCT ONLY WHEN DONE BY A STATE. STATE ACTION, AS IT HAS COME TO BE KNOWN CAN ERECT NO SHIELD AGAINST MERELY PRIVATE CONDUCT, HOWEVER, DISCRIMINATORY OR WRONGFUL.
>
> SHELLEY v KRAEMER, 334 U. S. 1, 13 (1948).....
> THE AMENDMENT DOES NOT FORBID A STATE TO PROSECUTE FOR CRIMES COMMITTED AGAINST A PERSON OR HIS PROPERTY, HOWEVER, PREJUDICED OR NARROW THE VICTIM'S VIEWS MAY BE....OUR SOCIETY HAS PUT ITS TRUST IN A SYSTEM OF CRIMINAL LAWS TO PUNISH LAWLESS CONDUCT...IT WOULD BETRAY OUR WHOLE PLAN FOR A TRANQUIL AND ORDERLY SOCIETY TO SAY THAT A CITIZEN, BECAUSE OF HIS PERSONAL PREJUDICES, HABITS, ATTITUDES, IS CAST OUTSIDE THE LAW'S PROTECTION AND CANNOT CALL FOR THE AID OF OFFICERS SWORN TO UP HOLD THE LAW AND PRESERVE THE PEACE.....
> NONE OF OUR PAST CASES JUSTIFIES READING THE FOURTEENTH AMENDMENT IN A WAY THAT MIGHT WELL PENALIZE CITIZENS WHO ARE LAW ABIDING ENOUGH TO CALL UPON THE LAW AND ITS OFFICERS FOR PROTECTION INSTEAD OF USING THEIR OWN PHYSICAL STRENGTH OR DANGEROUS WEAPONS TO PRESERVE THEIR RIGHTS.[7]

THIS ARGUMENT BY JUSTICE BLACK SIMPLY SAID THAT BLACK PEOPLE SHOULD NOT FORCE THEIR CONSTITUTIONAL RIGHTS. BLACK PEOPLE SHOULD NOT FORCE THEMSELVES ON OTHERS. MR. BLACK BELIEVED THAT PROPERTY RIGHTS SHOULD TAKE PRIORITY OVER THE RIGHTS OF LIFE AND LIBERTY. FOR A MAN WHO HAD TAKEN PRIDE IN HIS KNOWLEDGE OF HISTORY AND THE LAW JUSTICE BLACK HAS FAILED TO GRASP THE SIGNIFICANCE OF THE STATE ACTION CONCEPT FOUND IN THE FOURTEENTH AMENDMENT.

JUSTICE BLACK DID NOT SEE ANY CORRELATION BETWEEN THE SHELLEY DECISION WITH THE SIT-IN CASES. HE BELIEVED THAT THERE IS A FEDERAL RIGHT FOR THE STATE TO PROTECT AND DEFEND THE PROPERTY RIGHTS OF OWNERS OF PROPERTY. HE BASED HIS ARGUMENT ON THE CIVIL RIGHTS ACT OF

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[7] ALBERT BLANSTEIN. CIVIL RIGHTS AND THE AMERICAN NEGRO (NEW YORK: TRIDENT PRESS, 1968) PP. 520-521

1866. He contended that this federal statutory law forbids private agreement with the nationally defined right to own property. The rights of a property owner, according to Justice Black has a more privilege position in a hierarchy of rights than the rights of a Black person.

It was felt by Justice Black that it was imperative that the state in this case must maintain a peaceful and orderly society. The action on the part of the restaurant owner was a private action and the state was only doing what it was suppose to do. It is simply the American thing to do to call the police if an intruder trespasses on ones property. Justice Black reportedly great knowledge of history did not accept the Solicitor General argument that once a state maintained a long history of discrimination against Black people, they can not simply say all of a sudden that we are purely not responsible for what private citizens may do. Black contended one can not hold the present generation of Marylanders responsible for what their ancestors did to Black people. Yet, if a group of people continue an unjust system then they are still guilty.

In the majority concurring opinions Justice Douglas and Goldberg saw the need for a more just relationship among the people of the United States. This belief is implied in their decision. The Declaration of Independence states a great American committment for a more just order in American society. This creed set the guidelines for a just enactment of the general welfare.

THE IDEALS OF THE AMERICAN CREED WERE NOT FULLY ESTABLISHED WITH THE ADOPTION OF THE AMERICAN CONSTITUTION BECAUSE OF THE TRAGEDY OF SLAVERY; THE CONSTITUTION WHILE HERALDING LIBERTY, IN EFFECT DECLARED ALL MEN FREE AND EQUAL EXCEPT BLACK MEN. THIS INCONSISTENCY REFLECTED A FUNDAMENTAL DEPARTURE FROM THE AMERICAN CREED. THIS DEPARTURE WAS SUPPOSE TO BE SET RIGHT BY THE AMERICAN CIVIL WAR WITH THE ADOPTION OF THE 13TH, 14TH AND 15TH AMENDMENTS TO THE CONSTITUTION. FREEDOM AND EQUALITY WERE GUARANTEES EXPRESSLY FOR ALL PERSONS REGARDLESS OF RACE.[8] JUSTICE DOUGLAS SAID THAT IN THE LIGHT OF THIS AMERICAN COMMITTMENT TO EQUALITY AND HISTORY OF THE COMMITTMENT, THESE AMENDMENTS (13TH, 14TH AND 15TH) MUST BE READ NOT AS LEGISLATIVE CODES WHICH ARE SUBJECT TO CONTINUOUS REVISION WITH CHANGING COURSE OF EVENTS, BUT AS REVELATIONS OF GREAT PURPOSES WHICH WERE INTENDED TO BE ACHIEVED BY THE CONSTITUTION. THIS POINT CAN BE DRAWN FROM THE COURT DECISION IN PRIGG V PENNSYLVANIA.[9] THIS COURT SAID IN ESSENCE THAT WHEN A FEDERAL RIGHT IS GUARANTEED BY THE CONSTITUTION, THE FAIR APPLICATION OR ENFORCEMENT OF THAT RIGHT HAS BEEN GIVEN TO THE NATIONAL GOVERNMENT WHICH HAS BEEN CLOTHED WITH APPROPRIATE AUTHORITY AND FUNCTIONS TO ENFORCE THAT RIGHT. THE SUPREME COURT WAS ABLE TO FIND CONSTITUTIONAL SUPPORT OF SLAVERY; NOW THE COURT SHOULD SUPPORT TRUE EQUALITY IN AMERICA.

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[8] U. S. V REESE 92 U. S. 244

[9] 16 PETERS U. S. (1842)

JUSTICE BLACK CANNOT AVOID THE REVOLUTIONARY INTENT OF THE CIVIL WAR AMENDMENTS. IT IS INTERESTING BUT RATHER PUZZLING TO SEE JUSTICE BLACK'S RATIONALE FOR THE DEFENSE OF PROPERTY RIGHTS. APPARENTLY HE HAS FORGOTTEN HIS DECISION OF MARSH V ALABAMA, OR THE TYPE OF LITIGANTS IN BOTH CASES MAY HAVE CAUSED A CHANGE IN THE VIEW OF JUSTICE BLACK'S FAMOUS DECISION IN MARSH V ALABAMA. HE SAID: "THE MORE AN OWNER, FOR HIS ADVANTAGE OPENS UP HIS PROPERTY FOR USE BY THE PUBLIC IN GENERAL, THE MORE DOES HIS RIGHTS BECOME CIRCUMSCRIBED BY THE STATUTORY AND CONSTITUTIONAL RIGHTS OF THOSE WHO USE IT."[10] JUSTICE BLACK'S POSITION HAD CHANGED CONSIDERABLY IN BELL V MARYLAND FROM HIS POSITION IN MARSH V ALABAMA. IN THE MARSH CASE HE CONTENDED THAT THERE ARE LIMITS TO THE RIGHTS OF PROPERTY OWNERS. WHILE IN THE BELL CASE HE CONCLUDED THAT THE STATE HAD VIRTUALLY A DUTY TO PROTECT THE PROPERTY OWNER'S RIGHTS OVER AGAINST ANY RIGHTS OF ANY INDIVIDUAL. THIS WAS CONSIDERED RIGHT IN ORDER TO MAINTAIN A TRANQUIL AND ORDERLY SOCIETY. THE DEFENSE OF PROPERTY RIGHTS AS IN THE BELL CASE HAS BECOME A SIGNIFICANT FEATURE OF THE OPINION OF JUSTICE BLACK SINCE 1964. HE BELIEVED THAT THE DEMONSTRATORS AND THE PROPERTY OWNER SHOULD PUT THEIR TRUST IN THE LEGAL REMEDIES FOR THE AIRING AND VIEWPOINT WAS ESPECIALLY TRUE IN THE CASES WHEN BLACKS ACTIVELY SOUGHT THEIR RIGHTS OUTSIDE OF THE COURTS.[11]

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[10] JOHN FRANK, MR. JUSTICE BLACK - THE MAN AND HIS OPINIONS (NEW YORK: ALFRED KNOPF, 1949) P. 266

[11] A. E. HOWARD, "MR. JUSTICE BLACK; THE NEGRO PROTEST MOVEMENT AND RULE OF LAW", 53 VIRGINIA LAW REVIEW 1070 (JUNE 1967)

Evidently Justice Black believed that the Black man must move in a slow and prescribed way in order to obtain his rights as a citizen. Apparently Justice Black generally accepted views of Kyle Haselden when he said:

> The Negro is required by the White man to 'keep his place'. But the Negro's place is not really a place but rather a manner and a mood; his place is spiritual rather than spatial. If his mood and manner are right, if his mood and manner reveal in him a genuine spirit of subjection, subordination, and dependence, then his place is almost anywhere. In such settlings the physical nearness of the Negro is not abhorrent to the White man; all doors are open to him if he knows his place. What is intolerable to the Negro that the Negro questions the fundamental and underlying assumption of his inferiority. When that happens, as it now does increasingly, the White man must substitute racial distance for racial doctrine in order to reassert his superiority. In a word, the Negro must be accepted on the White man's terms or be segreated from the White man.[12]

The action taken by Justice Black in the sit-in cases clearly violates the God given dignity of man, and the human oneness which God has given all of his creatures. Such a course of action tends to deny God's created community and historic purpose for man.[13]

The apparent switch in political philosophy was denied by Justice Black.[14] James Kilpatrick, a conservative newspaperman, said Justice Black has followed the trend of the once radical Justice

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[12] George D. Kelsey, Racism and The Christian Understanding of Man (New York: Charles Scribner's Sons, 1965) p. 103

[13] Ibid p. 104

[14] Charles A. Miller. The Supreme Court and The Uses of History (Cambridge: Belknap Press of Harvard University Press, 1968) p. 112

FRANKFURTER AND JUST MELLOWED WITH AGE. THIS MAY BE TRUE. JUSTICE BLACK REACHED THE AGE OF 78 YEARS OLD WHEN HE BEGAN TO FOLLOW A RATHER CONSERVATIVE POINT OF VIEW.[15]

IN KEEPING WITH HIS PRECEDENCE SET IN THE BELL V MARYLAND DISSENT, HE RESTATED OR REAFFIRMED HIS POSITION IN SEVERAL OTHER SIGNIFICANT CASES FROM 1964 TO 1968. DURING THIS PERIOD JUSTICE BLACK BEGAN TO DRAW PRACTICAL LINES ON THE LIMITATION OF INDIVIDUAL FREEDOM OF ACTION. HE BEGAN TO ASSERT THE VIEW THAT THE CONSTITUTIONAL PROTECTION OF EXPRESSION MUST BE INTERPRETED ONLY IN THE LIGHT OF THE FORCES OF WHICH ARE DICTATED BY ORDERLY SOCIETY GOVERNED BY THE CONSTITUTIONAL RULE OF LAW.[16]

IN BROWN V LOUISIANA,[17] THE COURT OVERRULED A CONVICTION OF FOUR BLACKS FOR STAGING A PROTEST OF THE SEGREGATION PRACTICES IN A PUBLIC LIBRARY. IN A CONCURRING DISSENT JUSTICE BLACK ALONE WITH JUSTICE CLARK, HARLAN, AND STEWART DID NOT AGREE WITH THE MAJORITY OPINION. JUSTICE BLACK BELIEVED THAT IT WAS WRONG TO PROTEST SEGREGATION IN A PUBLIC PLACE LIKE THE PUBLIC LIBRARY. HE CONTENDED THAT FREEDOM OF SPEECH DOES NOT ALLOW ONE TO USE PUBLIC OR PRIVATE PROPERTY AS A VEHICLE OF PROTEST. JUSTICE BLACK VIRTUALLY ADMITTED THAT THE EVIDENCE SUBSTANTIATED THE PRACTICE OF SEGREGATION BUT HE FELT THAT

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[15] STEPHEN STRICKLAND, "MR. JUSTICE BLACK: A REAPRAISAL," 25 FEDERAL BAR JOURNAL 381 (1965)

[16] CHARLES RICE, "JUSTICE BLACK: THE DEMONSTRATORS AND A CONSTITUTIONAL RULE OF LAW," 14 U C L A LAW REVIEW 458 (JANUARY 1, 1967).

[17] 383 U. S. 131 (1866)

THE BLACK YOUTHS SHOULD NOT HAVE ENGAGED IN A PROTEST AT A PUBLIC LIBRARY. JUSTICE BLACK RESORTED TO FINDING A TECHNICAL EXCUSE TO AVOID FACING THE REAL CONSTITUTIONAL RIGHTS OF BLACK PEOPLE.

AGAIN THE CRY FOR EQUAL RIGHTS TAKES A BACK SEAT TO THE WHITE INSTITUTIONAL TACTICS OF SPOON FEEDING BLACKS WITH THEIR RIGHTS. THESE RIGHTS WERE GIVEN TO THEM WHEN THEY WERE OFFICIALLY INCLUDED IN THE UNITED STATES CONSTITUTION AFTER THE RATIFICATION OF THE CIVIL WAR AMENDMENTS. IT IS DIFFICULT TO SEE HOW JUSTICE HUGO BLACK, AN ASTUTE STUDENT OF HISTORY AND LAW, LIKE TO MANY OF HIS ASSOCIATES, CAN CONTINUE NOT TO SEE THE UNDENIALABLE FACT THAT STATE ACTION HAS SUPPORTED, MAINTAINED, AND ENCOURAGED THE RATIONING OFF OF OR SIMPLY IGNORING THE RIGHTS OF BLACK CITIZENS. SUCH PRACTICES HAS PLANTED THE SEEDS FOR SELF DESTRUCTION OF AMERICAN SOCIETY. A CLASSIC ILLUSTRATION OF THE IMPACT OF THE SCOPE OF VENON OF SEGREGATION HAS BEEN PLANTED INTO THE LIFE AND CUSTOM AND INSTITUTIONS BY THE ACTION OF THE SUPREME COURT AND CAN BE SEEN IN JACK GREENBERG'S BOOK, RACE RELATIONS AND AMERICAN LAW AND PAULI MURRAY'S, STATES' LAWS ON RACE AND COLOR.[18]

JUSTICE BLACK LIKE OTHER LEADERS IN THE WHITE COMMUNITY HAVE USED TERMS QUITE LOOSELY LIKE THE PUBLIC INTEREST, RIGHTS OF MAN, FREEDOM, JUSTICE, STATES RIGHTS, LAW, CONSTITUTION, CUSTOMS, PEACE AND TRANQUILITY. ONE CAN NO LONGER VIEW THESE TERMS JUST IN TERM OF WHITE PEOPLE. THE BLACK PEOPLE IN AMERICA ARE NOT AN UNHEARD OF OR

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[18]PAULI MURRAY, ED. STATES' LAWS ON RACE AND COLOR. (NEW YORK: WOMAN'S DIVISION OF CHRISTIAN SERVICE OF THE UNITED METHODIST CHURCH, 1951).

UNKNOWN SUBSTANCE IN AMERICAN SOCIETY, BUT A LIVING WITNESSING COALITION OF PEOPLE WHO ARE GOING TO BRING SUBSTANTIVE MEANING TO THE TERMS OF LIFE, LIBERTY AND JUSTICE UNDER LAW FOR ALL CITIZENS.

THE EVIDENCE IS CLEAR THAT JUSTICE BLACK AND MANY OF HIS SUPPORTERS DID NOT WANT TO FACE THE ISSUE THAT BLACK PEOPLE MUST BE AFFORDED FULL RIGHTS AND RESPONSIBILITIES AS OTHER PEOPLE. THE COLOR OF A MAN'S SKIN IS NOT AN ADEQUATE JUSTIFICATION FOR LIMITING THE OPPORTUNITY FOR PERSONS TO HELP BUILD A BETTER SOCIETY HERE ON EARTH. SILONE'S SPINA WAS RIGHT WHEN HE SAID:

> FREEDOM IS NOT SOMETHING YOU GET AS A PRESENT....YOU CAN'T BEG YOUR FREEDOM FROM SOMEONE. YOU HAVE TO SEIZE IT -- EVERYONE AS MUCH AS HE CAN.[19]

ACCORDING TO REINHOLD NIEBUHR IN HIS NOTED BOOK, MORAL MAN AND IMMORAL SOCIETY, CHANGE WILL TAKE PLACE WHEN THE ENSLAVED RECOGNIZE THAT POWER MUST BE MET WITH POWER. NO BLACK MAN WILL EVER BE GOOD ENOUGH IN THE EYES OF WHITES TO DESERVE EQUALITY.[20]

IN ADDERLY V FLORIDA, JUSTICE BLACK AVOIDED THE ISSUES OF THE RIGHTS OF BLACK PEOPLE IN AMERICA. HE WROTE THE OPINION OF THE COURT. THIS CASE DEALT WITH A GROUP OF COLLEGE STUDENTS WHO WERE CONVICTED FOR DEMONSTRATING AT A PUBLIC JAIL. THE PETITIONERS ARGUED THAT THE FLORIDA TRESPASS LAW WAS VOID FOR VAGUENESS BECAUSE IT REQUIRED TRESPASS TO TAKE PLACE WITH MALICIOUS INTENT. THE PETITIONERS WERE JUST

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[19] JAMES CONE. A BLACK THEOLOGY OF LIBERATION. (NEW YORK: J. B. LIPPENCOTT COMPANY, 1970) P. 177

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PROTESTING THE SEGREGATION PRACTICES IN THE JAIL. JUSTICE BLACK ARGUED THAT THE JAIL WAS THE WRONG PLACE TO PROTEST FOR THIS WAS RESTRICTIVE PROPERTY.

IN ADDITION, THE PETITIONERS ARGUED THAT THE PETTY CRIMINAL STATUE COULD NOT BE USED TO VIOLATE MINORITIES CONSTITUTIONAL RIGHTS. AGAIN JUSTICE BLACK WAS BLATANTLY EVASIVE WITH THE RIGHTS OF BLACK PEOPLE. HE SAID THIS ARGUMENT BY THE PETITIONERS MAY BE TRUE BUT THIS POINT OF VIEW WOULD NOT HELP THE COURT DECIDE THE CASE. IN COMPLIANCE WITH HIS TECHNICAL EVASIVE TECHNIQUES JUSTICE BLACK ASSERTED THAT NOTHING IN THE CONSTITUTION COULD PREVENT FLORIDA IN ITS TRESPASS STATUE. MOREOVER, JUSTICE BLACK CONTENDED THAT PEOPLE DO NOT HAVE A RIGHT TO PROPAGANDIZE THEIR POSITION WHENEVER AND WHEREVER THEY PLEASE. JUSTICE BLACK AND HIS POLITICAL ASSOCIATES SHOULD BE ANSWERING THE FOLLOWING QUESTIONS. ARE BLACK PEOPLE HUMAN BEINGS, WHO HAVE BEEN GRANTED CITIZENSHIP RIGHTS IN AMERICA? IF SO THEY SHOULD BE GIVEN THE TYPE OF PROTECTION AS CITIZENS AS WAS GIVEN TO THE SLAVE OWNERS BY THE FEDERAL GOVERNMENT PRIOR TO THE CIVIL WAR IN ORDER TO MAINTAIN THE SLAVE SYSTEM.

ONE CAN LOOK AT THIS PROBLEM FROM ANOTHER PERSPECTIVE IN THE CONSTITUTIONAL PHILOSOPHY OF JUSTICE BLACK. PRIOR TO 1964, HE WAS A LEADER IN THE AREA OF CIVIL LIBERTIES. ONE SHOULD NOTE THAT DURING THE EARLIER CASES, THE ACTIVE DEMONSTRATIONS BY BLACKS FOR THEIR RIGHTS WERE NOT AT ISSUE. PRIOR TO 1967 HE HAD EXPRESSED GREAT CONTEMPT FOR ANY OFFICIAL ENCROACHMENT UPON THE FREEDOM OF EXPRESSION, AND HE WAS NOTED FOR HIS ABILITY TO DISCERN AND CONDEMN FORMALISTIC DISTINCTION BY WHICH LEGISLATION SOUGHT TO EMASCULATE BASIC CONSTITUTIONAL

PROTECTIONS. JUSTICE BLACK HAD GAINED THE REPUTATION FOR GOING TO BAT FOR THE PROTECTION OF THE RIGHTS OF UNPOPULAR DISSENTERS. HE CONTENDED, THEN THAT AN INDIVIDUAL HAD AN ABSOLUTE RIGHT TO DISAGREE. JUSTICE BLACK SAID IN BARENBLATT V U. S. THAT GOVERNMENT DID NOT HAVE A RIGHT TO CURTAIL ANY 14TH AMENDMENT GUARANTEES.[21]

AGAINST THIS BACKGROUND OF BEING THE GREAT DEFENDER OF THE RIGHTS OF THE DISSENTERS, JUSTICE BLACK NOW ASSERTS A POSITION OF BEING THE GREAT DEFENDER OF THE STATUS QUO. THIS WAS EVIDENT IN BELL V MARYLAND WHEN HE ASSERTED THAT THE LAW SHOULD PROTECT THE PROPERTY OWNER OVER AGAINST THE RIGHTS OF INDIVIDUALS TO LIFE AND LIBERTY. THIS WAS OPPOSITE TO THE VIEW HE TOOK IN MARSH V ALABAMA. IT IS POSSIBLE THAT THIS SHIFT FROM DEFENDING PERSONAL TO PROPERTY RIGHTS MAY HAVE BEEN DUE TO THE FACT THAT THE RIGHTS OF BLACKS WERE AN ISSUE IN THE BELL CASE AND NOT IN THE MARSH CASE.

ANOTHER CASE WHICH POINTS OUT THIS SHIFT IS BROWN V LOUISIANA. IN THIS CASE JUSTICE BLACK IN A DISSENTING OPINION SAID:

> I AM DEEPLY TROUBLED WITH THE FEAR THAT POWERFUL PRIVATE GROUPS THROUGHOUT THE NATION WILL READ THE COURT'S ACTION, AS I DO -- THAT IS AS GRANTING THEM A LICENSE TO INVADE THE TRANQUILITY AND BEAUTY OF OUR LIBRARIES WHENEVER THEY HAVE QUARRELED WITH SOME STATE POLICY WHICH MAY OR MAY NOT EXIST. IT IS AN UNHAPPY CIRCUMSTANCE IN MY JUDGEMENT THAT THE GROUP, WHICH MORE THAN ANY OTHER HAS NEEDED A GOVERNMENT OF EQUAL LAWS AND EQUAL JUSTICE, IS NOW ENCOURAGED TO BELIEVE THAT THE BEST WAY FOR IT TO ADVANCE ITS CAUSE,

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21 PETER DONNICI, "PROTECTION OF THE MINORITIES: MR. JUSTICE HUGO BLACK" 32 UNIVERSITY OF MISSOURI AT KANSAS CITY LAW REVIEW PP. 283-285, (SUMMER, 1966).

> WHICH IS A WORTHY ONE, IS BY TAKING THE LAW INTO ITS OWN HANDS FROM PLACE TO PLACE AND FROM TIME TO TIME.[22]

JUSTICE BLACK SEEM TO THINK THAT BLACK PEOPLE HAVE A RIGHT TO ADVANCE THEIR STATUS IN SOCIETY BUT THE PUBLIC LIBRARY IS NOT THE PLACE TO DEMAND ONE RIGHTS. HE DID NOT WANT TO DEAL WITH THE FACT THAT THE STATE SUPPORT OF A SEGREGATED LIBRARY IS CONTRARY TO THE DICTATES OF THE 14TH AMENDMENT. AGAIN JUSTICE BLACK SEEMS TO FIND IT NECESSARY TO SUPPORT THE LIBRARY AS IF IT WAS A SACRED PLACE OVER AGAINST THE RIGHTS OF BLACK PEOPLE. THIS POSITION IS EVIDENT ALSO IN THE ADDERLY V FLORIDA CASE. IN THE COURT OPINION JUSTICE BLACK SAID THIS CASE DIFFERED FROM OTHER RIGHTS PROTEST CASES BECAUSE THE PROPERTY INVOLVED WAS A JAILHOUSE YARD, WHERE SECURITY WAS IMPORTANT. IN UPHOLDING THE DEMONSTRATORS CONVICTION JUSTICE BLACK SAID:

> THE STATE, NO LESS THAN A PRIVATE OWNER OF PROPERTY HAS POWER TO PRESERVE THE PROPERTY UNDER ITS CONTROL FOR THE USE TO WHICH IT IS LAWFULLY DEDICATED.[23]

IT IS EVIDENT THAT JUSTICE BLACK FOUND IT NECESSARY TO SUPPORT PROPERTY RIGHTS. FROM THE FACTS OF THIS CASE IT WAS APPARENTLY CLEAR THAT THE STATE OF FLORIDA THROUGH ITS ACTION IN SUPPORTING A SEGREGATED JAIL WAS NOT DEDICATED TO THE LAWFUL SUPPORT OF ALL ITS CITIZENS. JUSTICE BLACK SEEMED TO HAVE BEEN CONCERNED WITH SENDING OUT WARNINGS TO FUTURE BLACK PROTESTORS RATHER THAN DEDICATING HIMSELF TO HIS CONSTITUTIONAL DUTY TO STAMP OUT ALL OF

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[22] 383 U. S. 131

[23] 385 U. S. 39 (1966)

THE STATE VESTIGES OF SUPPORT OF RACISM, OR SECOND CLASS CITIZENSHIP. IF THIS WAS DONE JUSTICE BLACK WOULD HAVE BEEN INSTRUMENTAL IN MAKING BLACK DEMONSTRATIONS A POST SCRIPT IN HISTORY.

ATTENTION SHOULD NOW BE GIVEN TO AN ANALYSIS OF THE SUPREME COURT INSTITUTIONAL PRACTICE OF JUDICIAL RESTRAINT WHICH HAS BEEN USED TO HELP PREVENT BLACK PEOPLE FROM OBTAINING EQUAL RIGHTS. IN HIS BOOK, A CONSTITUTIONAL FAITH, JUSTICE BLACK SAID:

> THE CORNERSTONE OF MY CONSTITUTIONAL FAITH IS THE BELIEF THAT THE CONSTITUTION IS DESIGNED TO PREVENT PUTTING TOO MUCH UNCONTROLLABLE POWER IN THE HANDS OF ANY ONE OR MORE PUBLIC OFFICIALS. I DO NOT SUBSCRIBE TO LOOK AT THE INTERPRETATION OF THE DUE PROCESS CLAUSE WHICH ALLOWS JUDGES, ESPECIALLY JUSTICES OF THE UNITED STATES SUPREME COURT, TO HOLD UNCONSTITUTIONAL LAWS THEY DO LIKE..... JUDGES MAY ABUSE POWER NOT BECAUSE THEY ARE CORRUPT, BUT HONESTLY DESIRE TO PREVENT NATIONAL DISASTER....SUCH HONEST BELIEFS MAY REFLECT HUMAN HOSTILITY TO CHANGE. OTHER JUDGES WITH HONEST BELIEFS CHANGE IMPERATIVES, TAKE IT UPON THEMSELVES TO MAKE CHANGES WHICH CONGRESS ALONE HAS LEGISLATIVE POWER TO MAKE. I STRONGLY BELIEVE THAT THE PUBLIC WELFARE DEMANDS THAT CONSTITUTIONAL CASES MUST BE DECIDED ACCORDING TO TERMS OF OUR CONSTITUTION ITSELF, NOT ACCORDING TO JUDGES' VIEWS OF FAIRNESS, REASONABLENESS, OR JUSTICE. BECAUSE OF MY ULTIMATE FAITH IN THE PEOPLE AND THEIR REPRESENTATIVES, I HAVE NO FEAR OF CONSTITUTIONAL AMENDMENTS PROPERLY ADOPTED, BUT I DO FEAR THE REWRITING OF THE CONSTITUTION BY JUDGES UNDER THE GUISE OF INTERPRETATION.[24]

JUSTICE BLACK BELIEVES THAT THE CONSTITUTION HAS ONLY GIVEN CONGRESS THE POWER TO MAKE THE LAW. MOREOVER, THE PUBLIC WELFARE DEMANDS THAT THE CONSTITUTIONAL ISSUES MUST BE DECIDED IN THE LIGHT OF THE CONSTITUTION AND NOT ACCORDING TO THE VIEWS OF THE JUDGES. IN

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[24] H. BLACK. A CONSTITUTIONAL FAITH (NEW YORK: ALFRED KNOPF PRESS, 1968) PP. 14-23.

ADDITION, HE BELIEVES IN THE RIGHT TO EXPAND THE CONSTITUTION BY THE AMENDMENT PROCESS. EVEN THOUGH HE HOLDS THESE VIEWS HE SEEMS TO BE RELUCTANT TO GIVE JUSTICE TO THE ORIGINAL INTENT OF THE CIVIL WAR AMENDMENTS. THESE AMENDMENTS WERE DESIGNED TO FILL THE GAP BETWEEN BEING A BLACK SLAVE AND A FULL AND EQUAL CITIZEN IN AMERICA. JACOBUS TEN BROEK HAS PRESENTED A WELL DOCUMENTED ACCOUNT OF THE ANTI SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT.[25]

JUSTICE BLACK DOES NOT ADHERE TO THE POSITION THAT THE CIVIL WAR AMENDMENTS WERE DESIGNED TO CHANGE THE RELATIONSHIP OF THE BLACK MAN TO THE CONSTITUTION. THE NEW RELATIONSHIP COMMITTED THE FEDERAL GOVERNMENT TO PROTECT THE BLACK MAN. JUSTICE BLACK HAS NOT FULLY GRASPED THE NATURE OF THE LEGAL SYSTEM IN THE SOUTH AND IN OTHER AREAS OF AMERICA. LEON FREEDMAN WROTE A BOOK ON SOUTHERN JUSTICE IN 1965. HE REPEATEDLY STRESSED THE POINT THAT THE JUDICIAL SYSTEM IN THE SOUTH HAS NOT BEEN REPRESENTATIVE OF THE BLACK AMERICANS RIGHTS. EVEN THOUGH THIS RACIAL GROUP CONSTITUTED A VERY SIGNIFICANT PERCENTAGE OF THE POPULATION IN THE SOUTH, THE LAW HAS PLAYED AN ACTIVE ROLE IN DENYING BLACK PEOPLE OF THEIR CONSTITUTIONAL RIGHTS.[26]

IN SOME RECENT CASES THE OPINIONS OF JUSTICE BLACK HAVE SOUNDED LIKE A STATES RIGHTS JUDGE IN THE SOUTH. IN A DISSENTING OPINION IN

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[25] JACOBUS TEN BROEK, EQUAL UNDER LAW (NEW YORK: COLLIER BOOKS, 1965) PP. 234-238

[26] LEON FREEDMAN, ED., SOUTHERN JUSTICE (NEW YORK: PANTHEON BOOK, 1965) PP. 187-188.

South Carolina v Katzenbach, Justice Black said:

> One of the most basic premises upon our structure of government was founded was that the Federal government was to have certain specific and limited powers and no others, and all other power was to be reserved either to the states respectively or to the people. Certainly if all the provisions of our Constitution which limit the power of the Federal government and reserve other power to the state are to mean anything, they mean at least that the states have power to pass laws and amend their Constitution without first sending their officials hundreds of miles to Washington to beg federal authority to approve them.[27]

In this case Justice Black used the common argument of Southerners who believed the federal government was overstepping its powers in supporting Black people. This case centered around the efforts of the State of South Carolina trying to evade complying with the 1965 Voting Rights Act. Apparently Justice Black believed it was his duty to support the position of South Carolina, rather than support the congressional effort to eliminate a racial evil within our society.

Justice Black also followed this line of thought in Harper v Virginia State Board of Education. This case dealt with determing whether or not the use of a poll tax as an electoral standard in a state election violates the Equal Protection Clause of the Fourteenth Amendment. The Court concluded that it was unconstitutional. However, Justice Black looked at the case differently. In his dissent, he said:

> It should be pointed out at once that the court decision is to no extent based on a finding that the Virginia

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[27] 383 U. S. 301

> LAW AS WRITTEN OR AS APPLIED IS BEING USED AS A DEVICE OR MECHANISM TO DENY NEGRO CITIZENS OF VIRGINIA THE RIGHT TO VOTE ON ACCOUNT OF THEIR COLOR. IF THE RECORD COULD SUPPORT A FINDING THAT THE LAW AS WRITTEN OR APPLIED HAS SUCH AN EFFECT THE LAW WOULD OF COURSE BE UNCONSTITUTIONAL. THE MERE FACT THAT A LAW RESULTS IN TREATING SOME GROUP DIFFERENTLY FROM OTHERS DOES NOT, AUTOMATICALLY AMOUNT TO A VIOLATION OF THE EQUAL PROTECTION CLAUSE. TO BAR A STATE FROM DRAWING ANY DISTINCTION IN THE APPLICATION OF IT WOULD PARALYZE THE REGULATORY POWER OF LEGISLATION BODIES.[28]

JUSTICE BLACK HAS BEEN REGARDED AS A GREAT STUDENT OF HISTORY. YET HE SEEMS TO FORGET THE HISTORY BEHIND THE SOUTHERN STATES ORIGINAL INTENTION OF DRAWING UP A POLL TAX. HE SEEMS TO WANT TO PROTECT THE RIGHTS OF THE STATES IN MAKING DISTINCTIONS IN THE USE OF THE LAW. ON THE ONE HAND, HE CLAIMS TO WANT TO SUPPORT THE 14TH AND 15TH AMENDMENTS. ON THE OTHER HAND, HE SEEMS TO WANT TO PROTECT THE RIGHTS OF THE SOUTHERN STATE.

THIS WAS THE SAME MAN WHO HAS MANIFESTED A GREAT INTEREST IN FOLLOWING THE RULE OF LAW. HE HAD TRIED TO SEARCH FOR SIMPLICITY AND CLARITY IN THE LAW. APPARENTLY, HE HAD OVERLOOKED THE RIGHTS OF BLACK PEOPLE IN HIS EFFORT TO FIND SIMPLICITY IN THE LAW. CHARLES PRICE SAID IN HIS ARTICLE ABOUT JUSTICE BLACK THAT JUSTICE BLACK BELIEVED THAT THE CONSTITUTION MUST BE INTERPRETED IN THE LIGHT OF CONTEMPORARY PROBLEMS.[29] IN BROWN V BOARD OF EDUCATION, JUSTICE

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[28] 383 U. S. 663

[29] A. E. HOWARD. "MR. JUSTICE BLACK: THE NEGRO PROTEST MOVEMENT AND RULE OF LAW" 53 VIRGINIA LAW REVIEW 1070 (JUNE 1967).

BLACK WAS A STRONGER BACKER OF A FORWARD LOOKING COURT, NOT A COURT TRYING TO CURTAIL THE USE OF THE CONSTITUTION.

IF JUSTICE BLACK REALLY BELIEVED IN THE COURT INTERPRETING THE CONSTITUTION IN THE LIGHT OF CONTEMPORARY SITUATIONS, THEN HIS ACTIONS IN RECENT CASES DO NOT SUPPORT THIS VIEW. THERE ARE SEVERAL ESTABLISHED RULES OF LAW WHICH HE HAS NEGLECTED TO USE TO HELP THE BLACK MAN RECEIVE EQUAL JUSTICE BEFORE THE LAW. HE HAS NOT ACCEPTED THE FACT THAT SECTION 5 OF THE 14TH AMENDMENT WAS DESIGNED TO ACT AS A SWORD TO STAMP OUT THE BADGE OF THE SERVITUDE IN AMERICAN LAW. THIS SECTION GIVES CONGRESS THE RIGHT TO PASS LEGISLATION THAT WOULD BE NECESSARILY AND PROPERLY BROUGHT ABOUT IN THE TRANSFORMATION OF LAWS AND CUSTOMS IN AMERICA TO MAKE A REALITY OF THE AMERICAN CREED WHICH WAS DESIGNED FOR ALL CITIZENS.

IN ADDITION THE COLOR OF LAW STATUTES WERE DESIGNED TO KEEP LAW OFFICIALS FROM DEPRIVING BLACKS OF THEIR RIGHTS. IN THE UNITED STATES CODES 42 U. S. C. 1983 (1965) AN OLD LAW PROVIDED THAT A SUIT COULD BE FILED AGAINST PERSONS WHO UNDER COLOR OF LAW OR CUSTOM OF ANY STATE CAUSES ANY CITIZENS OF THE UNITED STATES TO BE DEPRIVED OF ANY RIGHTS AND PRIVILEGES OR IMMUNITIES SECURED BY THE CONSTITUTION. JUSTICE BLACK SEEMS TO HAVE FORGOTTEN THIS STATUTE IN THE ADDERLY AND BROWN V LOUISIANA DECISIONS. ONE COULD ALSO UTILIZE ANOTHER FEDERAL CIVIL WAR STATUTE, 42 U. S. C. 1885 (1968 ED.). THIS PROVISION DEALS WITH A CONSPIRACY TO DEPRIVE A CITIZEN OF HIS RIGHTS. IN ORDER FOR ACTION TO BE TAKEN UNDER THE COLOR OF LAW PROVISION WITHIN THE MEANING OF SECTION 1983 AND 1985 THERE MUST BE MISUSE OF POWER POSSESSED BY VIRTUE OF STATE LAW AND MADE POSSIBLE ONLY BECAUSE WRONGDOERS ARE

CLOTHED WITH AUTHORITY OF THE STATE. JUSTICE BLACK FEELS JUDICIAL RESTRAINT IS ESSENTIAL FOR THE GENERAL WELFARE OF SOCIETY. HE HAS OFTEN SAID A JUSTICE SHOULD NOT AVOID CONSTITUTIONAL QUESTIONS, BUT HE HIMSELF TENDED TO AVOID THEM IN FINDING A JUST SOLUTION TO THE PROBLEMS IN BROWN V LOUISIANA AND IN ADDERLY V FLORIDA.[30] THESE ARE ONLY TWO OF MANY CASES IN WHICH HE FAILED TO FOLLOW HIS WELL ESTABLISHED PRINCIPLES OF LAW.

NOW ATTENTION SHOULD BE GIVEN TO A BREAKDOWN OF THE VOTING PATTERNS OF JUSTICE BLACK IN THE AREA OF JURIES, PUBLIC ACCOMMODATIONS, FREE SPEECH, VOTING, TRIALS, HOUSING, FAMILY RELATION AND EDUCATION. JUSTICE BLACK HAS TENDED TO BE MORE INCLINED TO VOTE FOR BLACK PEOPLE IN THE AREA OF EDUCATION, HOUSING, FAMILY RELATIONS, BUT HE HAS TENDED NOT TO VOTE IN FAVOR OF BLACKS IN THE OTHER AREAS OF STUDY. FROM HIS OVERALL VOTING RECORD HE HAS TENDED TO VOTE IN FAVOR OF BLACKS ABOUT HALF THE TIMES HE HAS VOTED. IN 1966, THE YEAR OF THE BLACK POWER BATTLE CRY, JUSTICE BLACK VOTED AGAINST BLACK PEOPLE MORE OFTEN THAN DURING ANY OTHER PERIOD OF STUDY. HE APPARENTLY WILL CONTINUE TO VOTE ALONG RACIALLY CONSERVATIVE LINES.

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[30] A CONSTITUTIONAL FAITH. P. 15

TABLE 2

VOTING RECORD OF JUSTICE BLACK IN CASES INVOLVING BLACK PEOPLE IN THIS STUDY (TERMS)

	1964		1965		1966		1967		1968		TOTAL		%	
	PRO	CON	PRO	CON	PRO	CON	PRO	CON	PRO	CON	PRO	CON	PRO	CON
EDUCATION	2	0	1	0					2	0	5	0	100	0
RECREATION					0	3					0	3	0	100
PUBLIC ACCOMMO.	2	4					1	0	1	0	4	4	50	50
FREE EXPRESSION	1	0	1	1	0	2	0	1	0	1	2	5	29	71
VOTING & REPRESENTATION	1	0	3	0	1	2					5	2	71	29
HOUSING							0	1	1	0	1	1	50	50
JURIES			0	1			2	0			2	1	33	67
TRIALS					2	2	0	1	2	1	4	4	50	50
FAMILY RELATION							1	0	1	0	2	0	100	0
TOTALS	6	4	5	2	3	9	4	3	7	2	25	20	55	45

CHAPTER V

LEWIS STEEL AND THE SUPREME COURT

On October 13, 1968, an article appeared in the New York Times magazine which threatened to destroy the long courtship between the National Association for The Advancement of Colored People and the United States Supreme Court. This article was written by Mr. Lewis M. Steel, a White Associate Counsel of the NAACP. The thesis of this article was that the Court under Chief Justice Earl Warren had never committed itself to a society based upon principles of absolute equality. In support of this thesis Mr. Steel gave an overview of the history of the relationship between the Supreme Court and the Black man. According to Mr. Steel's argument other institutions besides the Supreme Court initiated the change in public policy toward race relations prior to the famous Brown v Board of Education of Topeka decision. For Mr. Steel's critical view of the Supreme Court he was fired by the Board of Directors of the National Association for the Advancement of Colored People.

Since Mr. Steel's argument is related to the position taken in this paper, the Steel thesis will be analyzed in terms of the Supreme Court decisions from 1959 to 1968. The frame of reference that Mr. Steel used was taken from his support of the view of the

National Advisory Commission on Civil Disorders that our nation is moving toward two societies, one black, one white - separate and unequal. This assumption by Mr. Steel was not supported in his historical sketch of the Supreme Court and the Black man. This contradiction, in philosophy and fact is really part of the great American Dilemma. There has never been a truly United American society.

In the article Mr. Steel stressed the point that the Brown v Board of Education decision was influenced by the changes in action of other agencies and events in American society. He noted the presidential executive order forbidding racial discrimination by the recipients of government contracts and the detrimental effect of racism as shown by the practice of racism in Nazi Germany. The writer of the article apparently failed to realize that the Supreme Court is a political agency or institution which is influenced by the environment. The Supreme Court has historically been guided by societal forces. The Separate but Equal doctrine, the Substantive Due Process, and Dual Federalism have permitted a few to control the economy until the New Deal revolution. The Great Depression and the typranny of the Nazis racism had its impact on the Supreme Court. The Court began in 1937 to move in another direction toward the Brown case of 1954. "The 1954 decisions simply reflected the conscience of their day as surely as Plessy reflects the spirit of the 1890's."[1]

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[1] Wallace Mendelson, Justices Black and Frankfurter: Conflict in the Court (Chicago: University of Chicago Press, 1961), pp. 75-76.

THE SUPREME COURT IS A NINE MEMBER DELEGATION OF APPOINTED PERSONS. THEY ARE SELECTED BY THE PRESIDENT OF THE UNITED STATES AND ARE CONFIRMED FOR OFFICE BY THE UNITED STATES SENATE. HISTORICALLY THE APPOINTMENT OF A PERSON HAS BEEN A POLITICAL PAYOFF. GENERALLY, THE PRESIDENT APPOINTS PERSONS TO THE SUPREME COURT WHO TEND TO REFLECT HIS POLITICAL PHILOSOPHY.[2] THE MEMBERS OF THE COURT UP UNTIL 1967 WERE WHITEMALES. THE PERSONAL CONTACT OF THE MEMBERS OF THE COURT WITH BLACK PEOPLE WAS VERY LIMITED. IN 1967 A BLACK MAN JOINED THE COURT--MR. THURGOOD MARSHALL. WHEN ONE JOINS THE COURT, HE DOES NOT FORGET HIS POLITICAL AND SOCIAL ORIENTATION. THE SUPREME COURT IS AN INSTITUTION WHICH TENDS TO RELY ON CERTAIN HISTORICAL GUIDELINES WHICH IN RACE RELATIONS HAS TENDED TO BE DETRIMENTAL TO THE REALIZATION OF EQUAL RIGHTS FOR BLACKS IN THE UNITED STATES. THESE BASIC GUIDELINES WERE SPELLED OUT BY JUSTICE BRANDEIS IN HIS CONCURRENCE IN ASHWANDER V TENNESSEE VALLEY AUTHORITY. HE SAID THAT:

1. THE COURT WILL NOT PASS UPON THE CONSTITUTIONALITY OF LEGISLATION IN A FRIENDLY, NONADVERSARY PROCEEDING.
2. THE COURT WILL NOT ANTICIPATE A QUESTION OF CONSTITUTIONAL LAW IN ADVANCE OF THE NECESSITY OF DECIDING IT.
3. THE COURT WILL NOT FORMULATE A RULE OF CONSTITUTIONAL LAW BROADER THAN IS REQUIRED BY THE PRECISE FACTS TO WHICH IT IS TO BE APPLIED.
4. THE COURT WILL NOT PASS UPON A CONSTITUTIONAL QUESTION, ALTHOUGH PROPERLY PRESENTED BY THE RECORD, IF THERE IS ALSO PRESENT SOME OTHER GROUND UPON WHICH THE CASE MAY BE DISPOSED OF.
5. THE COURT WILL NOT PASS UPON THE VALIDITY OF A STATUTE UPON

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[2] SIDNEY ULMER, "PUBLIC OFFICE IN THE SOCIAL BACKGROUND OF THE SUPREME COURT JUSTICES." 21 AMERICAN JOURNAL OF ECONOMICS AND SOCIOLOGY 57 (1962).

COMPLAINT OF ONE WHO FAILS TO SHOW THAT HE IS INJURED BY ITS OPERATION.

6. THE COURT WILL NOT PASS UPON THE CONSTITUTIONALITY OF A STATUTE AT THE INSTANCE OF ONE WHO HAS AVAILED HIMSELF OF ITS BENEFITS.
7. WHEN THE VALIDITY OF AN ACT OF THE CONGRESS IS DRAWN IN QUESTION, AND EVEN IF A SERIOUS DOUBT OF CONSTITUTIONALITY IS RAISED, IT IS A CARDINAL PRINCIPLE THAT THIS COURT WILL FIRST ASCERTAIN WHETHER A CONSTRUCTION OF THE STATUTE IS FAIRLY POSSIBLE BY WHICH THE QUESTION MAY BE AVOIDED.[3]

THE MAJORITY OF THE COURT HAD NOT ALWAYS FOLLOWED THE DICTATES OF THE BASIC PRINCIPLES. SINCE THE JUSTICES OF THE COURT ARE MEN WITH INDEPENDENT MINDS AND DIVERSIFIED BACKGROUNDS WHO INTERPRET THE CONSTITUTION IN TERMS OF THEIR EXPERIENCES, THEIR INTERPRETATION OF THE SOCIAL ORDER AND OF RELATED PRACTICAL MATTERS ARE REFLECTED IN THEIR JUDGMENT.[4] THUS IT IS NOT TOO SURPRISING THAT THE COURT FROM 1954-1968 DID NOT GO AS FAR AS IT COULD TO BRING ABOUT FULL EQUALITY FOR BLACKS, IN THE LIGHT OF THE SOCIAL STATUS AND BACKGROUND OF THE MEMBERS OF THE COURT.

YET, ONE CANNOT SAY THAT THE SUPREME COURT HAS NOT MADE PROGRESS IN AMERICAN RACE RELATION. THE EXTENT OF THE PROGRESS HAD NOT BEEN AS GREAT AS IT COULD HAVE BEEN. MR. STEEL POINTED OUT THE GRADUAL CHANGES IN THE COURT'S OPINIONS DURING THIS PERIOD TO THE EXTENT THAT THE INDIVIDUAL JUSTICES HAVE BEEN INFLUENCED BY THE URBAN

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[3] RICHARD JOHNSON, THE DYNAMICS OF COMPLIANCE (EVANSTON: NORTHWESTERN UNIVERSITY PRESS, 1967) PP. 30-31

[4] SIDNEY ULMER, "THE ANALYSIS OF BEHAVIOR PATTERN ON THE UNITED STATES SUPREME COURT," 22 JOURNAL OF POLITICS, PP. 629-638. (1960).

RIOTS AND THE BLACK POWER MOVEMENT.

NOW, ATTENTION SHOULD BE GIVEN TO AN ANALYSIS OF THE SIGNIFICANT CASES MENTIONED BY STEEL AND TO OTHER CASES OF THIS PERIOD PERTINENT TO THE STEEL ANALYSIS. ONE OF THE MAIN CRITICISMS OF THE WARREN COURT STEMS FROM THE POSITION TAKEN BY THE COURT IN SWAIN V ALABAMA.[5] THIS WAS A PIVOTAL CASE IN JURY SELECTION.[6] ROBERT SWAIN, A 19 YEAR-OLD NEGRO WAS INDICTED AND SENTENCED TO DEATH IN TALLADEGA COUNTY FOR THE ALLEGED RAPE OF A 17 YEAR-OLD WHITE GIRL. IN THE COURT'S OPINION, JUSTICE WHITE CAREFULLY POINTED OUT THAT BLACKS WERE NOT TOTALLY EXCLUDED FROM EITHER THE GRAND OR PETIT JURY PANEL. THIS POINT ACCORDING TO JUSTICE WHITE DISTINGUISHED THIS CASE FROM NORRIS V ALABAMA[7] AND PATTON V MISS.[8] HOWEVER, ANOTHER DEVICE WAS USED TO DISCRIMINATE AGAINST THE DEFENDANT. THE PROSECUTOR USED THE PEREMPTORY CHALLENGE TO EXCLUDE BLACKS FROM THE FINAL JURIES. THE EVIDENCE SHOWED THAT THE PROSECUTOR WOULD MAKE IT A POLICY TO EXCLUDE BLACKS BY THIS METHOD. JUSTICE WHITE SAID THAT THIS PRACTICE BY THE PROSECUTOR MAY BE UNCONSTITUTIONAL, BUT THERE IS NOT ENOUGH EVIDENCE TO SUPPORT THIS CLAIM IN THIS CASE. TO THE MAJORITY OF THE

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[5] 380 U. S. 202 (1966).

[6] THE SWAIN CASE DEALT WITH ALABAMA'S UNUSUAL METHOD OF JURY SELECTION. THE 12 JURORS FOR A CASE ARE SELECTED FROM A LIST OF 75 PERSONS. IN ORDER TO COME UP WITH THE 12 PERSONS, ALABAMA REQUIRES THAT THE DEFENSE HAS A RIGHT TO STRIKE OFF FOR NO REASON TWO VENIREMAN AND THE PROSECUTOR ONE. THIS PROCESS IS CONTINUED UNTIL 12 JURORS ARE LEFT.

[7] 294 U. S. 587 (1935).

[8] 332 U. S. 463 (1947).

COURT WOULD NOT STRIKE DOWN THIS ALABAMA SYSTEM OF JURY SELECTION, FOR ON ITS FACE THE COURT SAID IT WAS CONSTITUTIONAL. IT IS SIGNIFICANT TO NOTE THAT THIS SYSTEM WAS INITIATED IN 1909. EVEN THOUGH THE BLACK MAN SEEMS TO HAVE LOST GROUND IN THE STRUGGLE FOR A FAIR AND JUST JURY SYSTEM IN AMERICA, THIS COURT SEEMS TO HAVE SEEN THE VALUE OF FUTURE INVESTIGATION OF THIS CASE. THE COURT APPEARED TO REQUEST THAT MORE EVIDENCE BE PRESENTED TO SUBSTANTIATE THE VIEW THAT THE PROSECUTOR HAD SYSTEMATICALLY EXCLUDED BLACK JURORS BY USING THE PREEMPTORY EXEMPTION METHOD.[9] AGAIN THE COURT TENDED TO UTILIZE ITS STANDING RULES OF OPERATIONS TO EVADE ITS RESPONSIBILITY. THE COURT HAS ALSO MADE SOME SIGNIFICANT PROGRESS IN THE AREA OF JURY SELECTION. IT HAS STRUCK DOWN SEVERAL CASES OF CLAR PRIMA FACI DISCRIMINATION. THIS WAS TRUE IN WHITUS V GEORGIA[10] AND IN COLEMAN V ALABAMA[11]. THE SUPREME COURT HAD LAID DOWN THE RULE THAT THERE MUST NOT BE A PURPOSEFUL AND SYSTEMATIC EXCLUSION OF NEGROES FROM JURY PANELS. THE COURT HAD NOT DEALT WITH THE ISSUE THAT BLACKS SHOULD BE REPRESENTED ON JURIES. IN FACT, THE SUPREME COURT REFUSED TO REVIEW A SIGNIFICANT COURT OF APPEALS DECISION IN 1965. IN THIS CASE INVOLVING A NEGRO, THE BASIC CONSTITUTIONAL QUESTION HELD THAT DELIBERATE INCLUSION OF NEGROES OFFENDS THE EQUAL-PROTECTION CLAUSE OF

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[9] 380 U. S. 587 (1935)

[10] 385 U. S. 545

[11] 389 U. S. 22

THE FOURTEENTH AMENDMENT.[12] ONE CANNOT REALLY SAY WHY THE COURT REFUSED TO CONSIDER THIS SIGNIFICANT CASE FOR THE SUPREME COURT DOES NOT SAY WHY IT REFUSES TO HEAR CERTAIN CASES AND ACCEPT OTHER CASES.

IN THE STEEL REVIEW OF THE WARREN COURT, HE DID NOT DO JUSTICE TO THE FACT THAT THIS COURT DID REVIVE THE THE CIVIL WAR AMENDMENTS. THE WARREN COURT MAY NOT HAVE GONE AS FAR AS IT COULD HAVE IN ITS RACE RELATIONS CASES, BUT IT DID MAKE SOME GAINS FOR THE BLACK MAN. THE SIGNIFICANT CASES INVOLVING CIVIL WAR LEGISLATION WERE UNITED STATES V GUEST,[13] UNITED STATES V JOHNSON,[14] UNITED STATES V PRICE,[15] AND JONES V MAYER.[16]

IN LOOKING AT THESE CASES, ONE COULD COMBINE UNITED STATES V GUEST, UNITED STATES V JOHNSON AND UNITED STATES V PRICE FOR THEY DEALT WITH 18 U. S. C. 241 AND 18 U. S. C. 242. IN ORDER TO UNDERSTAND THE SIGNIFICANCE OF THESE CASES ONE MUST UNDERSTAND THE CIVIL WAR LEGISLATION IN QUESTION. THEY WERE AS FOLLOWS:

> 18 U. S. C. 241: IF TWO OR MORE PERSONS CONSPIRE TO INJURE, OPPRESS THREATEN, OR INTIMIDATE ANY CITIZEN IN THE FREE EXERCISE OR ENJOYMENT OF ANY RIGHTS OR PRIVILEGES SECURED TO HIM BY THE CONSTITUTION OR LAWS OF THE UNITED STATES, OR BECAUSE OF HIS HAVING SO EXERCISED THE SAME OR IF TWO OR MORE PERSONS GO IN DISGUISED WITH INTENT TO PREVENT OR HINDER A CITIZEN'S FREE EXERCISE OR ENJOYMENT OF ANY RIGHT OR

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[12] LOREN MILLER, THE PETITIONER (NEW YORK: MERIDIAN BOOKS, 1966), PP. 290-291

[13] 383 U. S. 745

[14] 36 U. S. L. WEEK 4289

[15] 383 U. S. 787

[16] 36 U. S. L. WEEK 4461

> PRIVELEGE SECURED TO HIM BY THE CONSTITUTION OR LAWS OF THE UNITED STATES, THEY SHALL BE FINED NOT MORE THAN $5,000 OR IMPRISIONED NOT MORE THAN TEN YEARS OR BOTH. (DERIVED FROM THE ACT OF MAY 31, 1870).[17]
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> 18 U. S. C. 242: WHOEVER, UNDER COLOR OF ANY LAW, STATUTE, ORDINANCE REGULATION, OR CUSTOM, WILLFULLY SUBJECTS ANY INHABITANTS..TO THE DEPRIVATION OF ANY RIGHTS, PRIVILEGES, OR IMMUNITIES SECURED OR PROTECTED BY THE CONSTITUTION OR LAWS OF THE UNITED STATES OR TO DIFFERENT PUNISHMENT, PAINS OR PENALTIES, ON ACCOUNT OF SUCH AN INHABITANT BEING AN ALIEN, OR BY REASON OF HIS COLOR, OR RACE, THAN ARE PRESCRIBED FOR THE PUNISHMENT OF CITIZEN SHALL BE FINED NOT MORE THAN $1,000 OR IMPRISONED NOT MORE THAN ONE YEAR OR BOTH (DERIVED FROM THE ACT OF APRIL 9, 1866).[18]

A SIGNIFICANT CASE WHICH THE COURT CONSIDERED WAS UNITED STATES V. PRICE.[19] DEPUTY SHERIFF CECIL PRICE DETAINED THREE CIVIL RIGHTS WORKERS---MICHAEL HENRY SCHWERNER, JAMES CHANEY, AND ANDREW GOODMAN. HE LATER CONSPIRED WITH 18 OTHER PERSONS WITH THE INTENT TO RELEASE THEM FROM CUSTODY AND THEN DROVE THEM TO A DESIGNATED PLACE WHERE THEY WERE BEATEN AND LATER KILLED. THE SIGNIFICANT QUESTION RAISED WAS WHETHER 18 U. S. C. 241 AND 18 U. S. C. 242 MAKE CRIMINAL THE CONDUCT FOR WHICH THE INDIVIDUAL WAS INDICTED. THE SIGNIFICANT RULE OF LAW WHICH THE COURT DERIVED WAS THAT THE 18 U. S. C. 241 AND 242 COULD ALSO APPLY TO PRIVATE CITIZENS IF IT COULD BE SHOWN THAT THEY ACTED WITH STATE OFFICIAL THEN THE ACTED UNDER COLOR OF LAW.[20] THIS WAS A VICTORY FOR THE BLACK MAN.

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[17] MILTON KONVITZ, A CENTURY OF CIVIL RIGHTS (NEW YORK: COLUMBIA UNIVERSITY PRESS, 1961). P. 68

[18] IBID

[19] 383 U. S. 787

[20] 383 U. S. 787

THE NEXT CASE WAS UNITED STATES v GUEST.[21] THIS CASE GREW OUT OF A SITUATION WHERE A BLACK MAN WAS KILLED ON A GEORGIA HIGHWAY. HE WAS GOING BACK TO WASHINGTON, D. C. AFTER FINISHING A TOUR OF MILITARY DUTY AT FORT BENNING, GEORGIA. THE SUPREME COURT REVISED THE DISTRICT COURT'S VIEW THAT THE BLACK MAN DID NOT HAVE A RIGHT TO TRAVEL. THE SUPREME COURT SAID THAT THE CONSTITUTIONAL RIGHT TO TRAVEL FROM ONE STATE TO ANOTHER, AND NECESSARILY TO USE THE HIGHWAYS AND OTHER INSTRUMENTALITIES OF INTERSTATE COMMERCE IN DOING SO, OCCUPIES A POSITION FUNDAMENTAL TO THE CONCEPT OF OUR FEDERAL UNION. IN ADDITION THE SUPREME COURT SAID TO BE COVERED UNDER THIS ACT, ONE MUST PROVE A SPECIFIC INTENT TO INTERFERE WITH THE FEDERAL RIGHT OF AN INDIVIDUAL. MOREOVER, THE DEFENDANT IS ENTITLED TO HAVE THE JURY INSTRUCTED IN THESE MATTER.[22] AGAIN THE COURT WAS UNDER A PARTIAL VICTORY FOR THE BLACK MAN.

IN MR. STEEL'S ANALYSIS OF THE COURT HE FAILED TO MENTION THE FACT THAT A BLACK MAN HAD BEEN ELEVATED TO THE SUPREME COURT. HE WAS THURGOOD MARSHALL. THE VERY PRESENCE OF A BLACK MAN ON THE COURT COULD PROVE TO BE A GREAT ASSET TO THE LEGAL STRUGGLE FOR JUSTICE FOR THE BLACK MAN. IN AN ARTICLE ABOUT JUSTICE MARSHALL, PROFESSOR RONALD DAVENPORT SAID JUSTICE MARSHALL PROBABLY MADE THE SECOND GREATEST CONTRIBUTION TO AMERICAN CONSTITUTIONAL LAW. HE WAS SECOND

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[21] 383 U. S. 745

[22] 383 U. S. 745

TO CHIEF JUSTICE JOHN MARSHALL. HIS PLACE IN HISTORY AS A CONSTITUTIONAL ADVOCATE IS ASSURED. YET, ONE CANNOT REALLY TELL WHAT PLACE HE WILL HAVE AS A SUPREME COURT JUSTICE. SINCE MR. MARSHALL WAS APPOINTED TO COURT FROM THE POSITION AS SOLICITOR GENERAL, HE WAS FORCED TO DISQUALIFY HIMSELF IN MANY CASES.[23] IN FACT OUT OF 257 CASES BEFORE THE COURT IN 1967 JUSTICE MARSHALL DID NOT PARTICIPATE IN 83 CASES.[24] THE SIGNIFICANCE OF JUSTICE MARSHALL ON THE COURT CAN NOT BE REALLY UNDERSTOOD UNTIL AFTER HE HAD BEEN ON THE COURT FOR A LONGER PERIOD OF TIME. ONE CAN SAY THAT THE ADDITION OF JUSTICE MARSHALL DOES NOT DESTROY MR. STEEL'S BASIC POSITION, BUT IT DOES PUT A DENT IN HIS OVERALL POSITION.

THERE ARE SEVERAL OTHER CASES WHICH SHOULD BE CONSIDERED IN DEALING WITH THIS THESIS. THESE CASES TEND TO SUPPORT THE VIEW THAT THE COURT HAS MOVED FARTHER IN SOME AREAS THAN MR. STEEL'S THESIS WOULD SUPPORT.

A SIGNIFICANT CASE WAS GREEN V COUNTY SCHOOL BOARD. THIS CASE DEALT WITH THE USE OF A FREEDOM OF CHOICE PLAN IN ORDER TO ACHIEVE INTEGRATION. IN THE COURT OPINION JUSTICE BRENNAN SAID:

> IN DETERMINING WHETHER THE RESPONDENT SCHOOL BOARD MET THE COMMAND OF BROWN I AND BROWN II BY ADOPTING ITS FREEDOM OF CHOICE PLAN, IT IS RELEVANT THAT THIS FIRST STEP DID NOT

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[23] RONALD DAVENPORT, "THE SECOND JUSTICE MARSHALL," 7 DUQUESNE LAW REVIEW 44 (1968).

[24] PERCIVAL JACKSON, DISSENT IN THE SUPREME COURT (NORMAN: UNIVERSITY OKLAHOMA PRESS, 1968), P. 512

> COME UNTIL SOME 11 YEARS AFTER BROWN II DIRECTED THE MAKING OF A PROMPT AND REASONABLE START. THIS DELIBERATE PERPETUATION OF THE UNCONSTITUTIONAL DUAL SYSTEM CAN ONLY HAVE COMPOUNDED THE HARM OF SUCH A SYSTEM. SUCH DELAYS ARE NO LONGER TOLERABLE FOR THE GOVERNING CONSTITUTIONAL PRINCIPLES NO LONGER BEAR THE IMPRINT OF NEWLY ENUNCIATED DOCTRINE. THE TIME FOR MERE DELIBERATE SPEED HAS RUN OUT....THE BURDEN ON A SCHOOL BOARD TODAY IS TO COME FORWARD WITH A PLAN THAT PROMISES REALISTICALLY TO WORK AND PROMISE REALISTICALLY TO WORK NOW.[25]

THIS CASE SHOWS THE COURT WAS READY TO BE VERY FORCEFUL IN THE FIELD OF EDUCATION. THE FORCEFULNESS OF THE SUPREME COURT WAS EVIDENT IN OTHER AREAS. THE COURT SAID IN REITMAN V MULKEY[26] THAT A STATE SPONSORED TYPE OF RESTRICTIVE COVENANT WAS UNCONSTITUTIONAL. THIS COURT ALSO TOOK A VERY FORWARD LOOKING STEP IN THE AREA OF FAMILY RELATIONS. IN LOVING V VIRGINIA[27] THE COURT SAID THAT THE VIRGINIA MISCEGENATION STATUE WHICH PREVENTS MARRIAGE BETWEEN PERSONS SOLELY ON THE BASIS OF THEIR RACIAL CLASSIFICATION VIOLATES THE EQUAL PROTECTION AND THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT. THIS ACTION BY THE COURT SEEMS TO INDICATE THAT THE COURT HAS MADE SOME EFFORT TOWARD REALIZATION OF A SOCIETY OF EQUALS. IN ADDITION THE JONES V MAYER[28] CASE WHICH WAS DISCUSSED IN CHAPTER THREE TENDS TO DISCREDIT THE STEEL THESIS TO A DEGREE.

THERE WERE OTHER DECISIONS RENDERED BY THE COURT FROM 1964 TO

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[25] 391 U. S. 430 (1968).

[26] 387 U. S. 369 (1967).

[27] 388 U. S. 1 (1967).

[28] 392 U. S. 409 (1968)

1968 WHICH SUPPORT THE VIEW THAT THE COURT HAS MADE SOME EFFORT IN BRINGING ABOUT EQUALITY IN AMERICAN SOCIETY.

DURING THIS PERIOD UNDER CONSIDERATION, THE SUPREME COURT RENDERED SOME SIGNIFICANT DECISIONS IN THE AREA OF DISCRIMINATORY STATE ACTION. A VERY SIGNIFICANT CASE WAS EVANS V NEWTON.[29] THIS CASE DEALT WITH THE WILL OF A UNITED STATES SENATOR FROM GEORGIA, WHICH WAS PROBATED IN 1911 AND CALLED FOR THE CITY OF MACON, GEORGIA, TO ACT AS TRUSTEE OF A PARK FOR WHITE PEOPLE ONLY. THE CITY KEPT THE PARK SEGREGATED FOR MANY YEARS, AND THEN THE PARK WAS INTEGRATED. AS A RESULT OF THIS ACTION TAKEN BY THE CITY, A SUIT WAS FILED TO GET THE CITY TO DE-SEGREGATE THE PARK. IN THE MEANTIME THE CITY TURNED THE PARK OFFICIALLY OVER TO SOME PRIVATE PERSONS. WHEN THIS CASE REACHED THE SUPREME COURT, IT RULED THAT A WILL WHICH LEAVES PRIVATE PROPERTY TO THE PUBLIC OR TO JUST WHITE PEOPLE CAN NOT BE ENFORCED BY THE COURT FOR SUCH ACTION IS UNCONSTITUTIONALLY STATE ACTION.[30]

ANOTHER IMPORTANT CASE WHICH THE WARREN COURT CONSIDERED WAS REITMAN V MULKEY.[31] THIS CASE DEALT WITH AN AMENDMENT TO THE CONSTITUTION OF THE STATE OF CALIFORNIA WHICH WAS BASED ON THE STATEWIDE BALLOT IN 1964. THE AMENDMENT WAS CALLED PROPOSITION 14 WHICH WAS

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[29] 392 U. S. 296 (1966)

[30] IN EVANS V ABNEY (DECIDED JANUARY 26, 1970) JUSTICE BERGER'S COURT REVERSED THIS MAJOR DECISION OF THE WARREN COURT.

[31] 387 U. S. 369 (1967)

DESIGN TO REPEAL THE CURRENT STATE LAWS AGAINST DISCRIMINATION IN HOUSING AND TO BAR FUTURE ACTION OF THE STATE IN THIS AREA. THE VOTERS OF CALIFORNIA PASSED THE AMENDMENT AND IT WAS ADDED TO THE STATE CONSTITUTION AS SECTION 26 OF ARTICLE 1. MR. AND MRS. NEIL REITMEN, A BLACK COUPLE AND APARTMENT OWNER LINCOLN MULKEY DECLARING HE HAD REFUSED TO RENT THEM AN APARTMENT BECAUSE THEY WERE BLACK. THIS CASE PASSED THROUGH A CALIFORNIA TRIAL COURT, THEN TO THE STATE SUPREME COURT AND FINALLY TO THE UNITED STATES SUPREME COURT. THEN, THE COURT OF LAST RESORT CONSIDERED THE CONSTITUTIONALITY OF PROPOSITION 14. IN THE COURT'S OPINION BY JUSTICE WHITE THE COURT RULED THAT THE EVIDENCE SHOWED THAT PROPOSITION 14 WAS DESIGNED TO REPEAL ALL STATE LAWS THAT "BORE ON THE RIGHT OF PRIVATE SELLERS." IN ADDITION IT WAS DESIGNED TO FORESTALL FUTURE STATE ACTION THAT MIGHT CIRCUMSCRIBE THIS RIGHT. SUCH ACTION BY THE STATE WOULD RESULT IN THE STATE TAKING A NEUTRAL POSITION VIOLATED THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT. THE UNITED STATES SUPREME COURT AGREED WITH THE COURT'S DECISION.

IN UNITED STATES V JOHNSON[32] THE COURT MADE AN ATTEMPT TO FILL A VACANCY IN THE FAMOUS 1964 CIVIL RIGHTS ACT. THE QUESTION RAISED IN THIS CASE WAS WHETHER CONSPIRACIES BY HOODLUMS TO ASSULT BLACKS FOR EXERCISING THEIR RIGHTS OF EQUAL PUBLIC ACCOMMODATIONS UNDER SECTION 201 OF THE CIVIL RIGHTS ACT OF 1964 ARE SUBJECT ONLY TO A CIVIL SUIT INJUNCTION AS PROVIDED BY PARAGRAPH 204 OF THE ACT. IN

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[32] 390 U. S. 563 (1968)

ADDITION THE QUESTION WAS CONSIDERED WHETHER THEY ARE ALSO SUBJECT TO CRIMINAL PROSECUTION UNDER 18 U. S. C. 241. THE COURT'S OPINION BY JUSTICE DOUGLAS EXPRESSED THE VIEWS OF FIVE MEMBERS OF THE COURT SAID THAT THE PROVISIONS OF SECTION 207 (B) OF THE CIVIL RIGHTS ACT OF 1964 MADE THE REMEDIES PROVIDED IN THE PUBLIC ACCOMMODATIONS PART OF THE ACT THE EXCLUSIVE MEANS OF ENFORCING RIGHTS BASED ON SUCH PART DOES NOT PRECLUDE A CRIMINAL PROSECUTION OF THE DEFENDANTS UNDER 18 U. S. C. 241, SINCE THE EXCLUSIVE REMEDY PROVISION APPLIES ONLY TO THE ENFORCEMENT OF SUBSTANTIVE RIGHTS OF PUBLIC ACCOMMODATIONS AGAINST PROPRIETORS AND OWNERS, AND DOES NOT PURPORT TO DEAL WITH OUTSIDERS WHO USE VIOLENCE AGAINST THOSE WHO ASSERT THEIR RIGHTS UNDER THE ACT. IN THE AREA OF VOTING, THE SUPREME COURT DECIDED IN HARPER V VIRGINIA STATE BOARD OF ELECTIONS[33] THAT THE $1.50 POLL TAX IMPOSED ON CITIZENS DESIRING TO VOTE IN STATE ELECTIONS VIOLATED THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT. MOREOVER, ONE SHOULD NOTE ALSO THAT THE COURT MADE A SIGNIFICANT DECISION IN THE AREA OF WELFARE RIGHTS. IN KING V SMITH,[34] THE COURT RULED THAT DESTITUTE CHILDREN WHO ARE FATHERLESS CANNOT BE FLATLY DENIED FEDERAL FINANCIAL ASSISTANCE ON THE TRANSPARENT FICTION THAT THEY HAVE A SUBSTITUTE FATHER. DURING THIS PERIOD THE COURT TOOK FORWARD LOOKING POSITION ON THE RIGHTS OF PERSONS WHO ARE ON TRIAL FOR A CRIME. IN BUMPER V

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[33] 383 U. S. 663 (1966).

[34] 392 U. S. 309 (1968).

North Carolina[35] the Court said that evidence obtained, from a home to be used against a defendant must be obtained by a search warrant or by the consent of the owner of the house. In another decision the Court said in Duncan v Louisiana[36] that a person has a right to a jury trial for a criminal offense which carries punishment for as much as two years confinement. A very important point must be re-affirmed here, the fact that all of the forementioned cases dealt with black people. In the light of this fact and the nature of the decisions rendered in this chapter, one must conclude that the Steel thesis tends to overstate the facts. It is true that the Warren Court did not go as far as it could to bring to light true equality, some meaningful advancements have been made by this Court. The real significance of these advancements can only be judged by future historians.

If future historians would carefully analyze the Supreme Court during the Warren years, it would probably support the view that the Court was influenced by political, social, and economic pressures to take more affirmative actions in human relations. The state support of discrimination has been called into question by the Warren Court. The moral view that freedom from racial discrimination is a right is gaining greater acceptance in the broaden spectrum of American society.

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[35] 391 U. S. 543 (1960)

[36] 391 U. S. 145 (1968).

THIS HAS CAUSED THE COURT TO RE-EXAMINE OUR CONSTITUTION IN ORDER TO GAIN SUPPORT OF THIS POSITION. THE CONSTITUTION MUST AFFIRM THIS HIGHER LAW OR NATIONAL LAW IF THE UNITED STATES CONSTITUTION IS GOING TO CONTINUE TO MEET THE NEEDS OF THE AMERICAN PEOPLE. IN THE 19TH CENTURY, THE UNITED STATES CONSTITUTION WAS VIEWED FROM THE PERSPECTIVE THAT THE U. S. GOVERNMENT SHOULD PROTECT THE RIGHTS OF INDIVIDUALS IN SOCIETY OF THEIR PROPERTY, LIFE AND LIBERTY. THE EMPHASIS TODAY IS TO PROTECT THE RIGHTS OF ALL OF THE PEOPLE IN SOCIETY FOR THE GENERAL WELFARE OF THE TOTAL COMMUNITY. IN ORDER FOR THIS COURSE OF ACTION TO BE TAKEN BY THE SUPREME COURT THE STATE ACTION DOCTRINE MUST BE USED TO AFFIRM THE RIGHTS OF THE BLACK AMERICANS IN ORDER TO ERADICATE RACISM. THE FEDERAL SYSTEM OF GOVERNMENT NEEDS TO BETTER USE THE INSTRUMENT OF STATE ACTION IN ORDER TO CURB RACIAL DISCRIMINATION IN PRIVATE CLUBS, ASSOCIATIONS, BUSINESSES, AND CHARITY ORGANIZATIONS. MOREOVER, THERE IS A GREAT NEED TO BETTER UTILIZE THE ARM OF THE FEDERAL GOVERNMENT IN ORDER TO BETTER REALIZE THE AMERICAN CREED OF LIBERTY AND JUSTICE FOR ALL CITIZENS, REGARDLESS OF RACE, COLOR OR CREED. THIS WRITER BELIEVES THESE IDEALS CAN BE REALIZED BY PLACING STATE ACTION IN LEGAL ACTUALITY IN ITS MOST INCLUSIVE STATUS IN THE LIGHT OF THE ROLE OF FEDERAL GOVERNMENT HAS PLAYED AND SHOULD PLAY IN THE MAINSTREAM OF THE TOTAL LIFE OF ITS CITIZENS. IN ADDITION THE PUBLIC INTEREST SHOULD BE GIVEN ITS PROPER DUE IN RELATIONSHIP TO THE PRIVATE INTEREST OF MEN IN THE LIGHT OF THE ROLE EACH MEMBER OF THE COMMUNITY MUST AND SHOULD PLAY IN THE PROMOTION OF THE GENERAL WELFARE OF THE TOTAL COMMUNITY.

THUS THE PUBLIC INTEREST SHOULD NO LONGER BE VIEWED AS AN INFRINGEMENT UPON THE PRIVATE INTEREST, BUT SHOULD BE VIEWED AS A MEDIUM BY WHICH AN INDIVIDUAL CAN GAIN MORE RIGHTS AS A MEMBER OF A COMMUNITY NOT AS AN ISOLATED BEING.

NOW, LET US TAKE A MORE TANGIBLE LOOK AT THE CONSTITUTIONAL MEANS BY WHICH RACIAL DISCRIMINATION CAN BE ELIMINATED. THE SUPREME COURT AND ALL OF THE OTHER GOVERNMENT BODIES HAVE A MORAL OBLIGATION TO SOCIETY, TO DEFEND AND PROTECT THE RIGHTS OF ALL OF THE PEOPLE. AS LONG AS THESE GOVERNMENTAL BODIES FAIL TO TAKE AFFIRMATIVE ACTION IN ORDER TO ERADICATE INSTITUTIONAL RACISM, THE LONGER THE AMERICAN SYSTEM OF GOVERNMENT WILL BE DESTROYING ITSELF. THE SUPREME COURT OF THE UNITED STATES HAS FROM TIME TO TIME EXPRESSED DICTUM WHICH COULD BE BETTER UTILIZED IN ORDER TO ACHIEVE EQUAL RIGHTS FOR ALL CITIZENS OF THE UNITED STATES.

JUSTICE RUTLEDGE STATED IN SCREWS V UNITED STATES[37] THAT THE RIGHT NOT TO BE DEPRIVED OF LIFE OR LIBERTY BY A STATE OFFICER WHETHER HE BE A LEGISLATOR, JUDGE, CLERK OR POLICEMAN WHO TAKES IT BY ABUSE OF HIS OFFICE AS GUARANTEED IN THE CONSTITUTION. TO SECURE THESE RIGHTS IS NOT BEYOND THE POWER OF THE FEDERAL GOVERNMENT. THUS, THE OFFICIAL OF THE STATE WHO DOES NOT CARRY OUT HIS JUST RESPONSIBILITY AS AN OFFICER CAN BE PUNISHED FOR ANY ACTION OR FAILURE TO ACT RESPONSIBLY AS AN OFFICER AND CAN BE PUNISHED FOR ANY ACTION OR

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[37] 325 U. S. 91 (1945).

FAILURE TO ACT RESPONSIBLY DURING THE COURSE OF HIS DUTY AS A STATE SERVANT OF THE PEOPLE.

MOREOVER IN JUSTICE MURPHY'S DISSENT IN THIS CASE HE SAID IF THE STATES ARE UNWILLING FOR SOME REASON TO PROSECUTE PERSONS FOR DEPRIVING PERSONS OF THEIR LIFE OR LIBERTY THEN THE FEDERAL GOVERNMENT MUST STEP IN UNLESS CONSTITUTIONAL GUARANTEES ARE TO BECOME WORTHLESS. THUS, IF THE STATES FAILED TO ACT THEN, THE FEDERAL GOVERNMENT IS DUTY BOUND TO PROTECT THE CONSTITUTIONAL RIGHTS OF ITS CITIZENS. THIS APPROACH COULD BE CALLED THE STATE INACTION APPROACH FOR SPECIAL EMPHASIS IS PLACED ON THE FAILURE OF THE STATE GOVERNMENT OR ANY OF ITS AGENTS FROM PROPERLY DOING HIS OR THEIR JOB.

SUCH PERSONS COULD BE PROSECUTED UNDER LAW THAT IS ALREADY ON THE FEDERAL STATUTE. IN THE UNITED STATES CODES 42 U. S. C. 1983, (1968) A SUIT COULD BE FILED AGAINST PERSONS WHO UNDER COLOR OF LAW OR CUSTOM OF ANY STATE CAUSES ANY CITIZEN OF THE UNITED STATES TO BE DEPRIVED OF ANY RIGHTS AND PRIVILEGES OR IMMUNITIES SECURED BY THE CONSTITUTION. IN THE FEDERAL STATUTE 42 U. S. C. 1985 (1968) THERE IS ANOTHER COLOR PROVISION WHICH CAN BE BETTER UTILIZED TO PROTECT AGAINST CONSPIRACIES TO INTERFERE WITH THE CIVIL RIGHTS OF THE CITIZENS OF THE UNITED STATES. IN ORDER FOR ACTION TO BE TAKEN UNDER THE COLOR OF LAW PROVISIONS WITHIN MEANING OF SECTION 1983 AND 1985 THERE MUST BE MISUSE OF POWER POSSESSED BY VIRTUE OF STATE LAW AND MADE POSSIBLE ONLY BECUASE WRONGDOERS ARE CLOTHED WITH AUTHORITY BY THE STATE.

SUCH PROVISIONS COULD BE USED TO COUNTERACT THE RACIST CRY FOR

LAW AND ORDER WHICH IS ACTING UNDER COLOR OF LAW TO DEPRIVE THE BLACK MAN OF HIS JUST DUE AS AN AMERICAN CITIZEN. THE FEDERAL GOVERNMENT SHOULD BETTER UTILIZE THESE PROVISIONS IN ORDER TO PROVIDE FOR THE GENERAL WELFARE AND THE GUARANTEES OF ALL OF ITS CITIZENS WHICH ARE FOUND IN THE UNITED STATES CONSTITUTION, AND IN THE GOVERNING LAWS OF AMERICA.

THERE ARE OTHER STRANDS WHICH CAN BE USED TO FIGHT RACIAL DISCRIMINATION. IN THE CIVIL RIGHTS CASES[38] JUSTICE HARLAN SAID IN HIS DISSENT THAT CONGRESS HAS NOT ENTERED THE DOMAIN OF STATE CONTROL AND SUPERVISION. IS SIMPLY DECLARES IN EFFECT THAT SINCE THE NATION HAS ESTABLISHED UNIVERSAL FREEDOM IN THIS COUNTRY FOR ALL TIME, THERE SHALL BE NO DISCRIMINATION BASED MERELY UPON RACE OR COLOR IN RESPECT TO THE ACCOMMODATION AND ADVANTAGE OF PUBLIC CONVEYANCES. SUCH DISCRIMINATORY PRACTICES BY CORPORATION AND INDIVIDUAL IN THE EXERCISE OF THEIR PUBLIC FUNCTIONS IS A FORM OF STATE ACTION PROTECTED BY BOTH THE 13TH AND THE 14TH AMENDMENT. THUS, ONE COULD SEE IMPLICIT IN THE CALL FOR FAIR RIGHTS BEING EMPLOYED BY INDIVIDUALS WHO ARE AGENTS OF THE STATE AND OR PERFORM SOME PUBLIC FUNCTION WHICH CAN BE REGULATED BY CONGRESS.

THE TIME HAS COME FOR THE COURT TO DISCONTINUE ITS PRACTICE OF SEEKING LIMITATIONS TO STATE ACTION. HAROLD HOROWILTZ SAID IN "THE MISLEADING SEARCH FOR STATE ACTION"[39] THAT STATE ACTION ALWAYS EN-

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[38] 109 U. S. 3 (1883)

[39] 30 CALIFORNIA LAW REVIEW 208 (1957)

FOLDS PRIVATE ACTION BECAUSE THE STATE ALWAYS ATTRIBUTE SOME LEGAL SIGNIFICANCE TO PRIVATE ACTION. IN EVERY CASE THE COURT SHOULD ANALYZE A SITUATION NOT FROM THE PERSPECTIVE OF FINDING STATE ACTION BUT FROM VIEWING A CASE FROM THE CONSTITUTIONALITY OF THAT STATE ACTION WHICH IS ALWAYS PRESENT.

THE COURT HAS ON OCCASIONS TRIED TO EVADE THE REAL HEART OF THE SITUATION BY TRYING TO SHOW THE DIFFERENCE BETWEEN THE SOCIAL AND CIVIL RIGHTS OF INDIVIDUALS. ONE CANNOT DRAW A LASTING DISTINCTION BETWEEN THESE FORMS OF RIGHTS. AS MEN BECOME MORE DEPENDED UPON OTHERS THE LINES OF DISTINCTION DRAWS NARROWER. CHARLES BLACK STATED IN HIS ARTICLE "STATE ACTION, EQUAL PROTECTION AND CALIFORNIA 14"[40] THAT LAW IS A RESOURCE TO BE HUSBANDED AND NO STATE CAN AT ANY ONE TIME ACT IN EVERY IMAGINABLE WAY TO EXTEND EQUAL PROTECTION. STATE NEUTRALITY IS BARELY POSSIBLE AND THAT NEUTRALITY WHERE ATTAINED ISOLATE RACIAL DISCRIMINATION FOR STATE POWER. THE EXPANSION OF STATE ACTION CONCEPT TO INCLUDE EVERY FORM OF STATE FOSTERING, ENFORCING AND EVEN TOLERATING ACTION DOES NOT HAVE TO MEAN THAT THE 14TH AMENDMENT IS TO REGULATE THE GENUINELY PRIVATE CONCERNS OF MAN.

THE INTEREST OF THE PUBLIC SHOULD BE VIEWED MORE IN THE MANNER IT CAN BE UTILIZED TO REALIZE THE AMERICAN CONSTITUTIONAL COMMITMENT TO THE AMERICAN CREED. THE COURT HAS ON OCCASION MOVED IN THE RIGHT DIRECTION IN THIS REGARD. THE SUPREME COURT SAID IN MARSH V ALABAMA[41]

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[40] 81 HARVARD LAW REVIEW 69 (1969)

[41] 326 U. S. 501

THAT THE MORE AN OWNER TO HIS ADVANTAGE OPENS UP HIS PROPERTY FOR USE BY RIGHT IN GENERAL THE MORE DOES HIS RIGHTS BECOME CIRCUMSCRIBED BY THE STATUTORY AND CONSTITUTIONAL RIGHTS OF THOSE WHO USE IT. IT IS IMPLIED IN THIS DECISION THAT THE MORE A PERSON OR ORGANIZATION OPENS UP HIS OR THEIR PROPERTY, THE GREATER THE RIGHTS THE COMMUNITY WOULD HAVE ON SUCH PROPERTY. CONSEQUENTLY ONCE A BUSINESS HAS OPENED ITSELF UP TO THE PUBLIC IT IS THEN DUTY BOUND TO LET THE PUBLIC PLAY A JUST ROLE IN ITS OPERATION. THUS, THE BLACK MAN SHOULD HAVE A FAIR SHARE IN ALL LEVELS OF THE OPERATIONS OF A PRIVATE CONCERN WHICH HAS A PUBLIC TRUST.

THE WARREN COURT WILL LONG BE REMEMBERED FOR ITS DECISION IN BROWN V BOARD OF EDUCATION. THE SUPREME COURT SAID WE MUST CONSIDER PUBLIC EDUCATION IN THE LIGHT OF ITS FULL DEVELOPMENT AND ITS PRESENT PLACE IN AMERICAN LIFE. ONLY IN THIS WAY CAN IT BE DETERMINED IF SEGREGATION IN PUBLIC SCHOOLS DEPRIVE ONE OF EQUAL PROTECTION OF THE LAW. IT IS IMPLICIT IN THE BROWN DECISION THAT THERE SHOULD AND MUST BE A REAPPRAISAL OF ALL INSTITUTIONS WHICH PERFORM A SOCIETAL FUNCTION. ORGANIZATIONS LIKE CHARITIES, BUSINESSES, CLUBS SHOULD BE CAREFULLY SCRUTINIZED IN ORDER TO SEE IF THE EDUCATIONAL FUNCTION WHICH THEY MAY PERFORM ARE PROPERLY REPRESENTING THE BLACK MAN AND OTHER LEADING MINORITY GROUPS. ONE SHOULD NOT FORGET THAT IN THE MUNN V ILLINOIS[42] CASE THE COURT SAID WHEN THE INTEREST OF THE PUBLIC IS AFFECTED BY PRIVATE PROPERTY THEN THE PROPERTY CEASES

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[42] 94 U. S. 117

TO BE STRICTLY PRIVATE. THEN, IF EDUCATION IS TO BE VIEWED IN THE LIGHT OF THE ROLE IT IS PLAYING TODAY THEN, THE DECISIONS OF THE SUPREME COURT MUST BE VIEWED IN THE LIGHT OF THEIR CONTRIBUTION TO THE REALIZATION OF THE AMERICAN COMMITMENT TO THE AMERICAN CREED.

IN COOPER V AARON[43] THE COURT SAID THAT THE RESPONSIBILITY FOR PUBLIC EDUCATION IS PRIMARILY THE CONCERN OF THE STATE, BUT IT IS EQUALLY TRUE THAT SUCH RESPONSIBILITIES LIKE ALL OTHER STATE ACTIVITIES MUST BE EXERCISED CONSISTENTLY WITH FEDERAL CONSTITUTIONAL REQUIREMENTS AS THEY APPLY TO STATE ACTION. THE CONSTITUTION CREATED A GOVERNMENT DEDICATED TO EQUAL JUSTICE UNDER LAW. THE COURT STRESSED THE POINT THAT STATE SUPPORT OF SEGREGATED SCHOOLS THROUGH ANY ARRANGEMENT, MANAGEMENT, FUNDS OR PROPERTY CANNOT BE SQUARED WITH THE AMENDMENT'S COMMAND THAT NO STATE SHALL DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAW.

IN A CONCURRING ARGUMENT JUSTICE FRANKFURTER SAID THE CONSTITUTION IS NOT A FORMULATION OF JUST THE PERSONAL VIEWS OF THE MEMBERS OF THIS COURT, NOR CAN ITS AUTHORITY BE REDUCED TO THE CLAIM THAT STATE OFFICIALS ARE ITS CONTROLLING INTERPRETERS. HABITS AND FEELINGS THEY ENGENDER MAY BE COUNTERACTED AND MODERATED. EXPERIENCE ATTESTS THAT SUCH LOCAL HABITS AND FEELINGS WILL YIELD GRADUALLY TO LAW AND EDUCATION. THEY VIGOROUSLY FLOW FROM THE FRUITFUL EXERCISE OR THE RESPONSIBILITY OF THOSE CHARGED WITH POLITICAL OFFICIAL POWER AND FROM THE ALMOST UNCONSCIOUSLY TRANSFORMING ACTUALITIES OF LIVING

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[43] 358 U. S. 81 (1958)

UNDER LAW.

HERE, JUSTICE FRANKFURTER REALIZED THAT LAW HAS HELPED TO CREATE THE CUSTOMARY PRACTICE OF RACIAL DISCRIMINATION TOWARD THE BLACK MAN, BUT THIS TREND CAN AND MUST BE CHANGED THROUGH THE PASSAGE OF JUST LAWS FOR BLACK PEOPLE AND THE TOTAL COMMUNITY. ONLY THROUGH THE PROPER TRAINING OF THE TOTAL CITIZENRY CAN THE MINDS OF THE BLACK AND WHITE PEOPLE IN AMERICA BE FREED OF THE VENON OF INSTITUTIONAL RACISM.

IN TERRY V ADAMS[44] THERE CAN BE FOUND SUPPORT FOR THE ARGUMENT THAT PRIVATE PROFESSIONAL CLUBS OR ORGANIZATIONS COMPOSED MAINLY OF PROFESSIONAL PERSONS DO NOT HAVE THE RIGHT TO BAR PERSONS FROM MEMBERSHIP DUE TO RACE. WE MUST KEEP IN MIND THE FACT THAT THE 13-15 AMENDMENTS WERE DESIGNED TO END RACIAL DISCRIMINATION. IN FACT IN A DECISION BY JUSTICE SWAYNE IN THE SLAUGHTER HOUSE CASE[45] WHICH WAS A DISSENTING VIEW, THE 13-15 AMENDMENTS WERE DESIGNED TO BE A NEW MAGNA CHARTA WHICH GOES BEYOND THE BOUNDS OF PUBLIC DISCRIMINATION.

KEEPING THESE POINTS IN MIND, TERRY V ADAMS[46] DECISION RULED THAT THE 15TH AMENDMENT BARS RACIAL DISCRIMINATION IN THE CONDUCT OF ELECTIONS. THE AMENDMENT INCLUDED ANY ELECTION IN WHICH PUBLIC ISSUES ARE DECIDED ON THE SELECTION OF PUBLIC OFFICIALS. IN ADDITION THE STATUE SHOWS THE CONGRESSIONAL MANDATE AGAINST DISCRIMINATION.

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[44] 345 U. S. 461 (1953)

[45] 83 U. S. 36 (1873)

[46] 345 U. S. 461 (1953)

WHETHER THE VOTING ON PUBLIC ISSUES AND OFFICIALS ARE CONDUCTED IN THE COMMUNITY OR ON THE STATE OR NATIONAL LEVEL.

IT IS IMPLICIT IN THIS OPINION THAT CLUBS AND ORGANIZATIONS CAN AND DO ELECT OFFICIALS WHO DECIDE PUBLIC ISSUES. THE EXECUTIVES IN LARGE CORPORATIONS, PROFESSIONAL CHARITIES, FOUNDATIONS, CIVIC AND FRATERNAL ORGANIZATIONS DO HELP TO DECIDE PUBLIC ISSUES IN AMERICA. THUS, IN THE LIGHT OF THESE FACTORS THERE MUST BE A SIGNIFICANT INVOLVEMENT OF THE MAJOR RACIAL GROUP IN THIS ELECTORAL PROCESS. THUS, IN ORDER FOR THIS TO TAKE PLACE, BLACKS MUST BE GIVEN AN OPPORTUNITY TO HAVE A PROPER VOICE IN THE ELECTORAL AND DELIBERATING PROCESS IN AMERICAN INSTITUTIONAL LIFE. THE OFFICIALS OF SUCH CONCERNS HAVE BEEN ENDOWED WITH SUCH PUBLIC TRUST DUE TO THEIR PROFESSIONAL STATUS AND INFLUENCE. THUS, IN ORDER FOR THE REALIZATION OF THE ULTIMATE AIM OF THE MAGNA CHARTA AMENDMENTS,BLACK PEOPLE MUST BE AFFORDED A FAIR SHARE IN THE DECISION MAKING PROCESS.

FINALLY, LET US RE-EMPHASIZE THE MAIN POINTS OF THIS WRITER'S CONTENTION THAT WE MUST ELIMINATE RACIAL DISCRIMINATION IN THE AMERICAN CREED IF WE ARE GOING TO SURVIVE AS A NATION. THE INACTIVITY OF THE STATE IN THE PROMOTION OF THE GENERAL WELFARE OF ALL OF ITS CITIZENS HAS HELPED TO CREATE, MAINTAIN, AND TO JUSTIFY RACISM AS A CUSTOMARY PRACTICE IN AMERICAN LIFE. STATE ACTION MUST BE VIEWED AS AN EXPANSIVE MECHANISM THAT WILL BE USED TO ELIMINATE RACIAL DISCRIMINATION IN AMERICA. WE CAN NOT CONTINUE TO USE YESTERDAYS UNDERSTANDING OF STATE ACTION FOR TOMORROW'S NEEDS IN HUMAN RELATIONS.

WE CAN NOT CONTINUE TO USE YESTERDAY'S UNDERSTANDING OF THE DIFFERENCES BETWEEN CIVIL AND SOCIAL RIGHTS IF WE ARE GOING TO ACHIEVE UNDREAMED DREAMS OF FREEDOM IN TOMORROW'S WORLD. LAW CAN NOT SURVIVE IF IT IS GOING TO CONTINUE TO USE YESTERDAY'S PRECEDENTS FOR TOMORROW'S NEEDS. AN ETHICAL SYSTEM WHICH SUPPORTS INJUSTICE CAN NOT BE SUPPORTED BY THE CREATOR OF ALL EXISTANCE. IF WE CONTINUE TO USE THE FEDERAL CONSTITUTION AS A FINALIZED GUIDELINE, THEN WE AS A FREE PEOPLE WILL LOSE THE FOUNDATION UPON WHICH THE CONSTITUTION WAS WRITTEN FOR FREEDOM AND JUSTICE FOR ALL. THERE IS NO DISCRIMINATION IN THE AMERICAN CREED BUT IN ITS PRACTICE.

CHAPTER VI

REFLECTIONS AND PROJECTIONS OF THE SUPREME COURT AND THE BLACKMAN

THE 1960'S WILL BE PROBABLY REMEMBERED BY FUTURE HISTORIANS FOR THE WAYS IN WHICH BLACK AMERICANS HAVE ACCENTED THEIR NEED FOR FREEDOM, JUSTICE AND FULL OPPORTUNITIES AS AMERICAN CITIZENS. IN SEPTEMBER OF 1862, ABRAHAM LINCOLN ISSUED HIS NOW WORLD FAMOUS EMANCIPATION PROCLAMATION. FOUR MILLION BLACK MEN, WOMEN, AND CHILDREN WERE SUPPOSEDLY GIVEN FREEDOM FROM THE BONDAGE OF SLAVERY. YET, IN THE YEAR OF 1964 THE UNITED STATES SUPREME COURT WAS CONSIDERING IF THE DESCENDENTS OF THOSE BLACK PEOPLE OF 1862 COULD EAT AT A PUBLIC RESTAURANT IN BALTIMORE, MARYLAND. IN THE LIGHT OF THIS CRUEL FACT, THE WRITER IN THIS CHAPTER WILL TAKE A VIEW OF THE SUPREME COURT IN 1954-1968 FROM A BLACK ETHICAL PERSPECTIVES AND PROJECT SOME FUTURE IMPLICATIONS OF THE ACTION OF THE COURT ON THE BLACK COMMUNITY.

THE UNITED STATES CONSTITUTION IS CONSIDERED AS THE GREATEST DOCUMENT WRITTEN BY MAN SINCE THE HOLY BIBLE AND THE KORAN. THE SUPREME COURT, THE SUPREME LEGAL BODY IN AMERICA RECEIVES ITS AUTHORITY FROM ARTICLE 111 OF THE UNITED STATES CONSTITUTION. IN ORDER FOR ONE TO CONSIDER THE ACTION OF THE SUPREME COURT, THE LEGAL BASIC OF AUTHORITY OF THE BODY SHOULD BE CONSIDERED.

ARTICLE 111 OF THE UNITED STATES CONSTITUTION STATES:

> SECTION 1. THE JUDICIAL POWER OF THE UNITED STATES SHALL BE VESTED IN ONE SUPREME COURT, AND IN SUCH INFERIOR COURTS AS THE CONGRESS MAY FROM TIME TO TIME ORDAIN AND ESTABLISH. THE JUDGES, BOTH OF THE SUPREME AND INFERIOR COURTS, SHALL HOLD THEIR OFFICES DURING GOOD BEHAVIOR, AND SHALL AT STATED TIMES RECEIVE FOR THEIR SERVICES, A COMPENSATION, WHICH SHALL NOT BE DIMINISHED DURING THEIR CONTINUANCE IN OFFICE. SECTION 11. THE JUDICIAL POWER SHALL EXTEND TO ALL CASES, IN LAW OF THE UNITED STATES, AND TREATIES MADE OR WHICH SHALL BE MADE UNDER THEIR AUTHORITY; TO ALL CASES OF ADMIRALTY AND MARITIME JURISDICTION; TO CONTROVERSIES TO WHICH THE UNITED STATES SHALL BE A PARTY; TO CONTROVERSIES BETWEEN TWO OR MORE STATES, BETWEEN A STATE AND CITIZEN OF ANOTHER STATE, BETWEEN CITIZENS OF DIFFERENT STATES, BETWEEN CITIZENS OF THE SAME STATE CLAIMING LANDS, UNDER GRANTS OF DIFFERENT STATES, AND BETWEEN A STATE OR THE CITIZENS THEREOF, AND FOREIGN STATES, CITIZENS OR SUBJECT. SECTION 111. TREASON AGAINST THE UNITED STATES, SHALL CONSIST ONLY IN LEVYING WAR AGAINST THEM, OR IN ADHERING TO THEIR ENEMIES, GIVING THEM AID AND CONFORT. NO PERSON SHALL BE CONVICTED OF TREASON UNLESS ON THE TESTIMONY OF TWO WITNESSES TO THE SAME OVERT ACT, OR ON CONFESSION IN OPEN COURT.[1]

THESE ARE CRITICAL TIMES IN THE LIFE OF THE SUPREME COURT. UNLIKE THE TIME IN WHEN THE SUPREME COURT DECIDED THE PLESSY V FERGUSON CASE, BLACK AMERICANS ARE NO LONGER POWERLESS FORCES WITHIN AMERICAN SOCIETY. THESE ARE DIFFERENT TIMES FROM THE DAYS OF THE EMANCIPATION PROCLAMATION. IN THE 1890'S AMERICAN SOCIETY, ESPECIALLY SOUTHERN SOCIETY WAS AGARIAN AND THE BLACK AMERICANS WERE AT THE MERCY OF THEIR SLAVEMASTERS. JUST ONE HUNDRED YEARS LATER AMERICAN SOCIETY HAS BECOME HIGHLY INDUSTRALIZED AND IMPERSONALIZED. A NEW NEGRO HAS EMERGED, BUT, IN THE WORDS OF JOSEPH HINES:

> THE NEWNESS SEEM....TO INHERE IN THE REFUSAL TO CONCEAL, REPRESS OR COMPROMISE THE SPIRIT OF MILITANCY AND RESISTANCE THAT HAS CHARACTERIZED SOME NEGROES IN ALL STATIONS THROUGHOUT OUR NATIONAL HISTORY....ON THE EBB AND FLOW OF RACIAL CHANGE, THE SPIRIT OF COMPROMISE AND ACCOMMODATION IS BEING CURTAILED AND THE ORIENTATION TOWARDS MILITANCY IS BEING

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[1] THE NEW YORK TIMES ENCYCLOPEDIA ALMANAC 1971 P. 62

ACCENTUATED AND GLORIFIED.[2]

THE MEMBERS OF THE SUPREME COURT WERE GIVEN OPPORTUNITIES UNDER THE LEADERSHIP OF CHIEF JUSTICE EARL WARREN TO ASSERT THE HUMANITY OF BLACK PEOPLE. THE MEMBERS OF THE SUPREME COURT REPRESENTED DIFFERENT BACKGROUNDS. ONE OF THE MOST SIGNIFICANT PERSONNEL CHANGES ON THE COURT DURING THIS TIME WAS THE APPOINTMENT OF FORMER UNITED STATES SOLICITOR GENERAL THURGOOD MARSHALL. HE HAS BEEN REGARDED BY MANY OF HIS COLLEGUES AS BEING ONE OF THE GREATEST CONTRIBUTORS TO CONSTITUTIONAL LAW SINCE CHIEF JUSTICE JOHN MARSHALL. HERE WAS A BLACK MAN WHO HAD WON MORE CASES BEFORE THE SUPREME COURT THAN ANY OTHER MAN, BEING GIVEN THE OPPORTUNITY TO BECOME A JUDICIAL DECISION MAKERS. SINCE HE HAD BEEN JUST ELEVATED TO THE COURT FROM THE OFFICE OF SOLICITOR GENERAL, ASSOCIATE JUSTICE MARSHALL FELT IT NECESSARY TO ABSTAIN FROM VOTING IN SEVERAL CASES DURING HIS FIRST TERM IN OFFICE.

IN THIS STUDY THIS WRITER SOUGHT TO ANALYZE THE VOTING RECORDS OF THE JUSTICES IN 46 CASES RELATED TO BLACKS BETWEEN 1964-1968. THE ANALYSIS WAS DONE FROM THE ETHICAL VIEW THAT BLACK AMERICANS DESERVE FULL OPPORTUNITY TO DEVELOP TO THEIR UPMOST LIMITS OF POTENTIALITY. THE JUDICIAL SYSTEM AND OTHER POLITICAL INSTITUTIONS IN AMERICAN LIFE HAVE HELPED TO CREATE THE RACIAL DELIMMA OF TODAY BY THEIR ACTION IN THE PAST AND IN THE PRESENT. THEY SHOULD HENCEFORTH TAKE AN AFFIRMATIVE ACTION TO ELIMINATE ALL FORMS OF RACISM IN AMERICAN

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[2] LEWIS KILLIAN AND CHARLES GRIGGS. RACIAL CRISIS IN AMERICA - LEADERSHIP IN CONFLICT (ENGLEWOOD CLIFFS: PRENTICE HALL, INC., 1964) P. 14

LIFE. THE SUPREME COURT SHOULD EXERCISE ITS RESPONSIBILITY AS THE DEFENDER OF THE RIGHTS OF AMERICAN CITIZENS UNDER THE MANDATE OF THE UNITED STATES CONSTITUTION. THE TRADITIONAL SUPREME COURT INSTITUTIONAL METHODOLOGIES OF PROCEDURES ARE NO LONGER FITTING FOR THE COURT TO USE IN ORDER TO BRING ABOUT EQUAL RIGHTS FOR ALL CITIZENS. THE SUPREME COURT AND OTHER INSTITUTIONS HAVE OPERATED FROM THE PERSPECTIVE OF OPERATING FROM A HIERARCHY OF RIGHTS. THE NUMBER ONE PRIORITY IN THE AMERICAN LEGAL SYSTEM HAS BEEN TO PROTECT THE RIGHTS OF PROPERTY OWNERS THEN SOME ATTENTION WAS GIVEN TO LIFE AND TO LIBERTY. THE SUPREME COURT WAS GIVEN OPPORTUNITIES TO FORMULATE A NEW HIERARCHY OF HUMAN RIGHTS, BUT THE INSTITUTIONAL PRESSURES FROM WITHIN AND FROM WITHOUT ONLY LET THE COURT MAKE A GRADUAL CHANGE FOR THE BETTER. THE PRACTICE OF GRADUALISM IN REGARD TO THE LEGAL SYSTEM WAS COMMON IN CASES THAT INVOLVED BLACK AMERICANS DEMANDING THE RIGHT TO BE FREE, BUT THE COURT SEEM TO ACT MORE SWIFTLY WHEN THE COURT DEALT WITH ECONOMIC ISSUES.

THERE WERE OTHER IMPORTANT POINTS FOUND IN THIS STUDY. THE SUPREME COURT DURING THE PERIOD OF THIS STUDY CONSIDERED MORE CASES INVOLVING CIVIL RIGHTS ISSUES THAN IN ANY OTHER COMPARABLE PERIOD IN THE COURT'S HISTORY. IN ADDITION THE COURT RESURRECTED SEVERAL PIECES OF CIVIL RIGHTS LEGISLATION WHICH HAD PASSED CONGRESS SHORTLY AFTER THE CIVIL WAR. THE COURT ALSO HAD SEVERAL OPPORTUNITIES TO ERASE FROM THE JUDICIAL RECORDS SEVERAL CASES WHICH HELPED TO PERPETUATE RACISM IN AMERICAN LIFE. THE SUPREME COURT COULD HAVE DECLARED THE 1875 CIVIL RIGHTS ACT CONSTITUTIONAL WHEN IT DECIDED ON THE CONSTITUTIONALITY OF THE 1964 CIVIL RIGHTS ACT BUT IT AVOIDED DEALING WITH THE SUBSTANTIVE RIGHTS OF BLACK AMERICANS ISSUES.

THE VOTING RECORDS OF THE JUSTICES IN THIS STUDY BROUGHT TO LIGHT SOME INTERESTING FACTS. THE STUDY POINTED OUT THE FACT THAT JUSTICE GOLDBERG,DOUGLAS, MARSHALL AND FORTAS SEEM TO ALWAYS VOTE IN FAVOR OF BLACK PEOPLE. YET, THEIR VOTING RECORDS WERE A LITTLE MISLEADING SINCE JUSTICE MARSHALL PARTICIPATED IN ONLY ELEVEN PER CENT OF THE FORTY-SIX CASES WHILE JUSTICES GOLDBERG AND FORTAS PARTICIPATED IN THIRTY THREE PER CENT AND SIXTY-THREE PER CENT RESPECTIVELY. ON THE OTHER HAND, THE OTHER JUSTICES, EXCEPT JUSTICE CLARK WHO PARTICIPATED IN THIRTY-SEVEN CASES PARTICIPATED IN AT LEAST FORTY-FIVE OF THE FORTY-SIX CASES.

THE CASES WERE DIVIDED INTO TEN AREAS. THEY WERE THE FOLLOWING: (A) FAMILY RELATIONS; (B) EDUCATION; (C) PUBLIC ACCOMMODATIONS; (D) RECREATIONAL FACILITIES; (E) FREE SPEECH; (F) HOUSING; (G) JURIES; (H) TRIALS; (I) VOTING; (J) REPRESENTATION. THE JUSTICES TENDED TO VOTE FAVORABLY FOR BLACK PEOPLE IN CERTAIN AREAS. CHIEF JUSTICE EARL WARREN GENERALLY VOTED IN FAVOR OF THE POSITION OF BLACK PEOPLE. HIS OVERALL PRO-BLACK VOTING RECORD WAS 96%. HE ONLY VOTED AGAINST THE POSITION OF BLACK IN TWO CASES. ONE CASE DEALT WITH PUBLIC ACCOMMODATIONS AND THE OTHER CASE DEALT WITH FREE SPEECH.

THE CRITERIA TO CLASSIFY THE VOTING PATTERN OF THE JUSTICES WAS DETERMINED BY USING THE FOLLOWING QUESTIONS AS GUIDES:

(A) DID THE JUSTICE SUPPORT FULL EQUALITY IN PUBLIC ACCOMMODATIONS FOR ALL AMERICANS?

(B) DID THE JUSTICE VOTE REPRESENT AN EFFORT TO BRING ABOUT FULL EQUALITY IN THE PURSUIT OF EDUCATIONAL OPPORTUNITIES?

(C) DID THE VOTE OF THE JUSTICE REFLECT AN EFFORT TO BRING ABOUT EQUAL REPRESENTATION FOR BLACK PEOPLE?

(D) IN THE FREE SPEECH CASES DID THE JUSTICE ADVOCATE FREEDOM OF EXPRESSION FOR BLACK PEOPLE IN ORDER TO BE ABLE TO REDRESS GRIEVANCES AGAINST SEGREGATION?

(E) IN THE JURY CASES DID THE JUSTICES SUPPORT THE POSITION THAT BLACKS SHOULD NOT BE SYSTEMATICALLY EXCLUDED FROM JURIES?

(F) IN THE FAMILY RELATION CASES DID THE JUSTICES ADVOCATE FULL EQUALITY FOR ALL PEOPLE?

(G) DID THE JUSTICE SUPPORT THE BLACK MAN'S RIGHT TO BUY AND RENT PROPERTY AS A WHITE PERSON?

THESE QUESTIONS SERVED AS GUIDELINES TO FOLLOW IN DETERMINING HOW TO CLASSIFY THE VOTING RECORDS OF THE JUSTICES. ALL OF THE CASES ANALYZED IN THIS STUDY USED THIS CLASSIFICATION GUIDEPOST.

THERE ARE CERTAIN CONCLUSIONS THAT ONE CAN DRAW FROM AN ANALYSIS OF THE CASES, THE COURT AND THE NATURE OF THE BLACK MAN IN THE 1960'S. THE PRESENCE OF A BLACK MAN ON THE SUPREME COURT CAN INFLUENCE THE FUTURE ACTIONS OF THE COURT. THE SUPREME COURT JUSTICES HAVE TRADITIONALLY HAD VERY LITTLE PERSONAL CONTACT WITH BLACKS ON A MAN TO MAN OR HUMAN TO HUMAN BASIS. THIS PERSONAL ASSOCIATION WITH JUSTICE MARSHALL CAN HELP TO DISPEL SOME OF THE INSTITUTIONAL IMPREGNATED VIEWS ABOUT BLACK PEOPLE WHICH HAVE INFLUENCED THE ACTIONS OF THE WHITE JUSTICES ON THE COURT.

AS BLACK PEOPLE GAIN MORE POLITICAL POWER IN CONGRESS, IN STATE LEGISLATURES, IN LOCAL GOVERNMENTS, IN BUSINESS, AND IN CHURCH RELATED

INSTITUTIONS MORE PRESSURE WILL BE PLACED ON THE SUPREME COURT, ON GOVERNMENT AND ON THE BUSINESS COMMUNITY TO CORRECT THE VESTIGES OF RACISM WHICH WHITE SOCIETY HAS CREATED, CONDONE AND PERPETUATED.

THERE IS ETHICAL JUSTIFICATIONS FOR BLACK AMERICANS TO DEMAND THEIR RIGHTS AS HUMAN BEING WHO ARE CHRISTIANS LIVING IN AMERICA. CHRISTIAN ETHICS IS NOT ONLY CONCERNED WITH MAKING MORAL JUDGEMENTS, BUT WITH IMPLEMENTING APPROPRIATE MORAL ACTS. THE PROPHETS OF THE OLD TESTAMENTS SAW HISTORY AS THE ARENA OF GOD'S ACTION AND THE SETTING IN WHICH MEN WERE TO EXERCISE THEIR BEST UNDERSTANDING OF JUSTICE. LAW, ETHICS AND JUSTICE SHOULD GO HAND IN HAND IN A GIVEN SOCIETY. IN TOO MANY CASES, THESE CONCEPTS ARE ONLY USED TO VALIDATE ACTIONS OF A FEW PERSONS DICTATING THE WELFARE OF A LARGER GROUP. ETHICS SUPPOSE TO HELP MAN TO ASSESS SITUATIONS AND TO FORMULATE ACTIONS THAT WILL EXPRESS THE HIGHEST SENSE OF RIGHTNESS. IN AMERICAN SOCIETY INSTITUTIONAL RACISM HAS ACTED LIKE A CANCEROUS GROWTH WHICH HAS PREVENTED LAW, ETHICS, AND JUSTICE FOR THE TOTAL COMMUNITY TO BECOME A REALITY IN AMERICAN LIFE.

DURING THE COURSE OF THE WARREN YEARS ON THE SUPREME COURT SOME ACTION WERE TAKEN TO BEGIN TO ROOT OUT THE CANCEROUS GROWTH CALLED RACISM, IN <u>BROWN</u> V <u>BOARD OF EDUCATION,</u> THE COURT SAID WE MUST CONSIDER PUBLIC EDUCATION IN THE LIGHT OF ITS FULL DEVELOPMENT AND ITS PRESENT PLACE IN AMERICAN LIFE. ONLY IN THIS WAY CAN IT BE DETERMINED IF SEGREGATION IN PUBLIC SCHOOLS DEPRIVE ONE OF EQUAL PROTECTION OF THE LAW. THIS WRITER CONTENDS THAT IN THE LIGHT OF THE GREAT NEED FOR SPECIALISTS IN VARIOUS FIELDS, THE PUBLIC FUNCTION OF EDUCATION HAS BEEN ASSISTED BY VARIOUS PRIVATE ORGANIZATIONS. THUS,

THE CONSTITUTIONAL UNDERSTANDING OF EDUCATION MUST BE EXPANDED MORE IN ORDER TO ADEQUATELY CONSIDER THE TOTAL REALM OF THE IMPACT EDUCATION PLAYS IN AMERICAN LIFE.

IT IS IMPLICIT IN THE BROWN DECISION THAT THERE SHOULD AND MUST BE A REAPPRAISAL MADE OF ALL INSTITUTIONS WHICH PERFORM A SOCIETAL OR PUBLIC FUNCTION. ORGANIZATIONS LIKE CHARITIES, BUSINESSES AND CLUBS SHOULD BE CAREFULLY SCRUTINIZED IN ORDER TO SEE IF THE EDUCATIONAL FUNCTION WHICH THEY MAY PERFORM ARE PROPERLY REPRESENTING THE BLACK AMERICANS AND OTHER LEADING MINORITY GROUPS. THERE IS HISTORICAL PRECEDENCE FOR THIS POINT OF VIEW IN THE MUNN V ILLINOIS CASE.[3] THE COURT SAID WHEN THE INTEREST OF THE PUBLIC IS AFFECTED BY PRIVATE PROPERTY THEN THE PROPERTY CEASES TO BE STRICTLY PRIVATE. MOREOVER, IF EDUCATION IS TO BE VIEWED IN THE LIGHT OF THE ROLE IT IS PLAYING TODAY IN HOLDING OUR SOCIETY, THEN ALL THE DECISION OF THE COURT MUST BE VIEWED IN THE LIGHT OF THEIR CONTRIBUTION TO THE REALIZATION OF THE AMERICAN COMMITMENT TO THE AMERICAN CREED. THE COURT HAS THE RESPONSIBILITY AND ETHICAL OBLIGATION TO COMMIT ITSELF TO ERASE FROM THE BOOKS OF AMERICAN LAW AND CUSTOM ALL OF ITS ACTIONS WHICH HAS RENDERED SUPPORT TO INSTITUTIONAL RACISM.

THE WARREN COURT FROM 1953-1968 HAS COUNTERACTED SOME OF THE VESTIGES OF INSTITUTIONAL RACISM. SOME OF THE ACCOMPLISHMENTS OF THE WARREN COURT HAVE BEEN THE FOLLOWING:

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[3] 92 U. S. 117

(A) Upheld a federal Civil Rights Act that in effect overruled the Civil Rights Cases of 1883;

(B) Toppled the separate-but equal rule of Plessy v Ferguson;

(C) Prohibited all state imposed segregation in all public schools;

(D) Declared segregation unlawful in all public carriers and public facilities;

(E) Interdicted judicial enforcement of racially restrictive covenants and closed the doors of federal and state courts against litigants seeking to collect damages for sales in violation of such agreements;

(F) Interpreted the equal protection of the law clause of the Fourteenth Amendment to mean that Negro sit-inners in places of public accommodation could not be successfully prosecuted under state breach of the peace or trespass statutes in cases where racial segregation was compelled by state law or city ordinance or imposed by executive order of municipal authorities or in the attenuated case, where state law required separate toilets and sanitary facilities for Black and White customers.

(G) Forbidden labor unions and employers from entering into discriminatory agreements against Negro non-union members of the same craft where federal law had clothed the union with bargaining rights.

The Warren Court has made progress in the area of human rights for all people, but it has not taken adequate affirmative action to

DESTROY INSTITUTIONAL RACISM ONCE AND FOR ALL. THE COURT HAS NOT ADEQUATELY USED THE STATE ACTION CONCEPT IN ORDER TO UNDUE WHAT THE COURT HAS HISTORICALLY DONE TO MAINTAIN RACISM IN AMERICAN LIFE. THE FAILURE OF THE STATE TO FULFILL ITS ETHICAL DUTY TO GUARANTEE THE CONSTITUTIONAL RIGHTS OF ALL OF ITS CITIZENS HAS HELPED TO CREATE RACISM AS A CUSTOMARY PRACTICE. THIS COURSE OF ACTION CAN AND MUST BE CHANGED IF AMERICAN DEMOCRACY IS GOING TO SURVIVE. STATE EXPANSIVE MECHANISM THAT WILL BE USED TO ELIMINATE RACIAL DISCRIMINATION IN AMERICA. WE CAN NOT CONTINUE TO USE YESTERDAY'S UNDERSTANDING OF STATE ACTION FOR TOMORROW'S NEEDS. WE CAN NOT CONTINUE TO USE YESTERDAY'S UNDERSTANDING OF THE DIFFERENCES BETWEEN CIVIL AND SOCIAL RIGHTS, IF WE ARE GOING TO USE THE FEDERAL CONSTITUTION AS A FINALIZED GUIDELINE, THEN WE AS A SO CALLED FREE PEOPLE WILL LOSE THE FOUNDATION UPON WHICH THE CONSTITUTION WAS WRITTEN FOR FREEDOM AND JUSTICE FOR ALL.

DURING THE WARREN YEARS ON THE SUPREME COURT THE PERSPECTIVES OF THE COURT SHIFTED. THESE SHIFTS MUST BE SEEN FROM AN ETHICAL PERSPECTIVE. CHIEF JUSTICE EARL WARREN AT THE LOUIS MARSHALL AWARD DINNER AT THE JEWISH THEOLOGICAL SEMINARY OF AMERICA IN NEW YORK ON NOVEMBER 11, 1962 SAID:

> LAW FLOATS IN A SEA OF ETHICS. EACH IS INDISPENSABLE TO CIVILIZATION. WITHOUT LAW, WE SHOULD BE AT THE MERCY OF THE LEAST SCRUPULOUS; WITHOUT ETHICS, LAW COULD NOT EXIST. WITHOUT ETHICAL CONSCIOUSNESS IN MOST PEOPLE, LAWLESSNESS WOULD BE RAMPANT. YET WITHOUT LAW, CIVILIZATION COULD NOT EXIST, FOR THERE ARE ALWAYS PEOPLE WHO IN THE CONFLICT OF HUMAN INTEREST IGNORE THEIR RESPONSIBILITY TO THEIR FELLOWMAN.[4]

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[4] SOCIAL PROGRESS P. 5

THE WARREN COURT HAS SHIFTED JUDICIAL LAW IN ORDER TO CHANGE VARIOUS DIMENSION OF FORMAL ACTS OF SEGREGATION. THIS MOVEMENT DID NOT BEGIN WITH THE WARREN COURT, BUT BECAME MORE PRONOUNCED DURING THIS ERA. THE BROWN V BOARD OF EDUCATION CASE SERVED AS A LAUNCHING PAD FOR THE SUPREME COURT TO EXPAND ITS EFFORTS TO ERADICATE FORMALIZED ACTS OF SEGREGATION. THE MEMBERS OF THE COURT PROBABLY BELIEVED THAT IT WAS EXPEDIENT FOR THEM TO MOVE SLOWLY.

IN HIS SPEECH JUSTICE WARREN SAW THE NEED TO CREATE THE PROFESSION OF COUNSELORS IN ETHICS. HE REALIZED THAT LAW HAS NOT GONE ETHICALLY FAR ENOUGH. IN FACT THE JUDGMENT OF THE MAKERS OF POWER IN OUR SOCIETY TEND TO DETERMINE WHAT IS LEGALLY RIGHT. HISTORICALLY, THE SUPREME COURT HAS PLACED A HIGHER VALUE ON PROPERTY RIGHTS THAN HUMAN RIGHTS. CONSEQUENTLY THIS TYPE OF ETHICAL PERSPECTIVE BY JUSTICES OF THE SUPREME COURT HINDERED BLACK AMERICANS EFFORTS TO BE DECLARED FIRST CLASS CITIZENS IN AMERICA.

CONCERN FOR INDIVIDUAL RIGHTS DID NOT BEGIN WITH THE WARREN COURT. PROBABLY THE GREATEST DEFENDER OF THE RIGHTS OF THE INDIVIDUAL WAS JUSTICE JOHN HARLEN WHOSE GRANDSON SERVED ON THE SUPREME COURT DURING THE WARREN YEARS. THE HONORABLE SIDNEY H. ASCH, A JUSTICE OF THE NEW YORK STATE SUPREME COURT SAID:

> THE STRIKING JUDICIAL SHIFT IN THIS CENTURY HAS BEEN THE CHANGING EMPHASIS OF THE SUPREME COURT FROM PROPERTY RIGHTS TO INDIVIDUAL RIGHTS. IN THE FIRST QUARTER OF THIS CENTURY, A JUDGE COULD STATE: 'OF THE THREE FUNDAMENTAL PRINCIPLES WHICH UNDERLIE GOVERNMENT, AND FOR WHICH GOVERNMENT EXISTS, THE PROTECTION OF LIFE, LIBERTY, AND PROPERTY, THE CHIEF OF THESE IS PROPERTY.' THE STRENGTH OF THE WARREN

> COURT'S POPULARITY (AND HATRED) RESTED ON ITS SUPPORT OF INDIVIDUAL FREEDOM RATHER THAN THE PROTECTION OF TRADITIONAL RIGHTS OF PROPERTY.[5]

THE SHIFTING VIEWS OF THE SUPREME COURT DURING THIS CENTURY WERE DUE TO MANY FACTORS. SOME OF THE MORE SIGNIFICANT FACTORS WERE AS FOLLOWS: CHANGES OF PERSONNEL ON THE COURT AND THE IMPACT THE COURT PLAYED ON THEIR LIVES; GROWTH OF THE POLITICAL VOTER POWER OF BLACKS AND OTHER MINORITIES; IMPACT OF NAZISM AND COMMUNISM ON THE WORLD; INCREASE IN THE EDUCATION LEVEL OF THE AVERAGE AMERICAN AND THE IMPACT OF WORLD WIDE PUBLIC OPINION ON AMERICAN PUBLIC POLICY. THESE ARE A FEW OF THE FACTORS WHICH BROUGHT ABOUT THIS SHIFT. ONE CAN NOT HONESTLY SAY THAT AMERICAN SOCIETY WAS BEGINNING TO RELY MORE UPON MORAL AND ETHICAL PRINCIPLES. THE SUPREME COURT HAS TRADITIONALLY RELIED ON PRECEDENTS IN THE FORMATION OF ITS DECISION. THIS TREND HAS MADE THE SHIFT FROM GIVING A HIGHER PRIORITY TO INDIVIDUAL RIGHTS THAN TO PROPERTY HAS BEEN SLOW.

DURING THE WARREN YEARS A GREATER EFFORT WAS MADE TO SPEED UP THIS PROCESS IN REGARDS TO THE FORMAL FACITS OF RACISM. IF "LAW FLOATS IN A SEA OF ETHICS" AS WARREN BELIEVES, LAW HAS BEEN CHANNELED INTO STORMS WHICH HAS GUIDED IT AWAY FROM THE CALM WATERS OF JUSTICE INTO THE STORMY SEA OF JUSTICE FOR SOME AT THE EXPENSE OF INJUSTICE FOR BLACK AMERICANS AND OTHER MINORITY PERSONS IN AMERICA. JUSTICE WARREN PROBABLY BELIEVED THAT SINCE OTHER INSTITUTIONS OF SOCIETY FAILED TO ADEQUATELY MAKE DECISIONS OF PUBLIC

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[5] SIDNEY M. ASCH, THE SUPREME COURT AND ITS GREAT JUSTICES (NEW YORK: ARCO PUBLISHING COMPANY INC., 1971) P. 224

POLICY BASED ON ETHICAL VIEWS, IT IS THE DUTY OF THE LAW AND THE JUDICIARY, TO FULFILL THIS NEED. HE BELIEVED THAT JUSTICE CONSISTED NOT OF PROVIDING A FAIR MECHANISM OF DECISION BUT OF SEEING THAT THE RIGHT SIDE, THE GOOD SIDE, PREVAILED IN THE PARTICULAR CASE.[6]

SUPREME COURT JUSTICES HAVE GENERALLY FORMULATED THEIR PARTICULAR LEGAL PHILOSOPHICAL PERSPECTIVES PRIOR TO OR DURING THE COURSE OF THEIR TENUE ON THE BENCH. JUSTICES MAY HAVE USED VARIOUS ETHICAL VIEWPOINT TO SUPPORT THEIR PARTICULAR PERSPECTIVE OF LAW. THE MEMBERS OF THE COURT ARE LIKE MOST WHITE AMERICANS WHO HAVE GENERALLY REGARDED THE BLACK MAN AS AN INFERIOR BEING. CONSEQUENTLY THIS RACIST VIEW POINT HAS BEEN REFLECTED IN VARIOUS PERSPECTIVES BY THE MEMBERS OF THE COURT IN THEIR ETHICAL AND NONETHICAL INTERPRETATION OF LAW.

THE WARREN COURT WAS COMPOSED OF INDIVIDUALS WHO HAD ESTABLISHED A METHODOLOGY OF ACTION IN RENDERING JUDICIAL DECISIONS. EVENTHOUGH JUSTICE FELIX FRANKFURTER RETIRED FROM THE COURT IN 1962, HE REPRESENTED A PRONOUNCED POINT OF VIEW ON THE COURT DURING THE WARREN ERA. JUSTICE FELIX FRANKFURTER WAS A SELF-APPOINTED GUARDIAN OF CONSISTENT INTERPRETATION OF THE CONSTITUTION. HE SAID IN 1947:

> THOSE LIBERTIES OF THE INDIVIDUAL WHICH HISTORY HAS ATTESTED AS THE INDISPENSABLE CONDITIONS OF AN OPEN AS AGAINST A CLOSED SOCIETY COME TO THIS COURT WITH A MOMENTUM FOR RESPECT LACKING WHEN APPEAL IS MADE TO LIBERTIES WHICH DERIVE MERELY FROM SHIFTING ECONOMIC

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[6] THE WARREN COURT - A CRITICAL ANALYSIS EDITED BY RICHARD H. SAYLER, BARRY B. BOYER AND ROBERT E. GOODING, JR. (NEW YORK: CHELSEA HOUSE 1969) P. 7

> ARRANGEMENTS. ACCORDINGLY, MR. JUSTICE HOLMES WAS FAR MORE READY TO FIND LEGISLATIVE INVASION WHERE FREE INQUIRY WAS INVOLVED THAN IN THE DEBATABLE AREA OF ECONOMIC.[7]

THIS POINT OF VIEW WOULD BE CALLED A STRICT CONSTRUCTIONIST VIEWPOINT BY PRESIDENT RICHARD NIXON. JUSTICE FRANKFURTER FOLLOWED THIS POINT OF VIEW AS LONG AS IT SUITED HIS PERSONAL INTEREST. HE WAS A FORMER HARVARD LAW PROFESSOR WHO BELIEVED IN JUDICIAL RESTRAINT BECAUSE HE BELIEVED THE SUPREME COURT SHOULD UPHOLD STATUTES WHENEVER POSSIBLE, YIELDING THE POLICY-MAKING FUNCTION TO LEGISLATORS.[8]

ON THE OTHER HAND JUSTICE WARREN BELIEVED ONE SHOULD SEEK JUSTICE FOR THE HURT PARTY CAN NOT BE CONCERNED PRIMARILY WITH STYLE, FORM AND VARIOUS SUPERFICIAL ASPECTS OF A CASE. THE SUPREME COURT HAS TRADITIONALLY PLACED A GREAT VALUE ON STABILITY, INTELLECTUALITY AND CRAFTSMANSHIP IN JURISPRUDENCE. THESE VALUES ON THE SURFACE MAY HAVE BEEN ALRIGHT, BUT THE APPLICATION OF THESE VALUES TO THE EFFORTS OF BLACK AMERICAN TO ACHIEVE JUSTICE IN AMERICA HAS CAUSED THESE VALUES TO HAVE INSTITUTIONAL RACISM OVERTONES. THE WARREN COURT HAS BEEN CALLED THE COURT WHICH HAS BEEN WORKING FOR SOCIAL CHANGE. YET THIS VIEWPOINT MUST BE QUALIFIED. THE DECISIONS OF THE WARREN COURT HAVE HELPED TO CHANGE THE TRADITIONAL STATE SUPPORT FOR FORMAL ACTS OF SEGREGATION AND RACISM. THE WARREN COURT DID NOT ABANDOM THE TRADITIONAL VALUES OF THE SUPREME COURT. IT ONLY MODIFIED THEM. TEN YEARS AFTER THE BROWN V BOARD OF EDUCATION CASE VERY LITTLE INTEGRATION OF PUBLIC SCHOOLS HAD TAKEN PLACE IN AMERICA. THE COURT

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[7] SIDNEY H. ASCH, THE SUPREME COURT AND ITS GREAT JUSTICES P. 163

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DID NOT SEEK TO ERADICATE INSTITUTION RACISM BY TAKING AFFIRMATIVE ACTION TO DECLARE UNCONSTITUTION THE MANY DECISIONS OF THE SUPREME COURT WHICH ARE RACIST IN NATURE. THE COURT DID NOT REALLY BELIEVE THAT BLACK PEOPLE HAD REALLY ACHIEVED MANHOOD BECUASE THE COURT SAW FIT TO USE THE COMMERCE CLAUSE IN THE CONSTITUTION IN ORDER TO DE-SEGREGATE PUBLIC FACILITIES INSTEAD OF RELYING ON THE SUBSTATIVE INTERPRETATION OF THE UNITED STATES CONSTITUTION.

IT IS VERY EVIDENT THAT THE COURT HAS PLACED A HIGHER VALUE ON INDIVIDUAL RIGHTS THAN THE EARLIER COURTS BUT THE COURT ADHERED TO POLITICAL PRESSURES TO NOT GO ETHICALLY FAR ENOUGH IN ORDER TO DE-CALRE THAT ALL AMERICANS HAVE A RIGHT TO LIVE, WORK, AND CONTRIBUTE TO THE GROWTH AND PROSPERITY OF AMERICA.

THE PROPHETS OF SOCIAL JUSTICE IN THE BLACK COMMUNITY AND IN OTHER MINORITY COMMUNITIES IN THE 1970'S WILL TAKE AFFIRMATIVE ACTION IN ORDER TO GET THEIR RIGHTS. THE SUPREME COURT AND THE CONGRESS WAS PRESSURED INTO REALLY BEGINNING TO TAKE STEPS FORWARD IN RACE RELATIONS. THE FACT THAT A BLACK MAN IS PRESENTLY SERVING ON THE SUPREME COURT AND ALSO SINCE THE PASSAGE OF THE 1965 VOTING RIGHTS ACT THERE HAS BEEN A TREMENDOUS UP SURGE IN POLITICAL POWER AMONG BLACKS IN AMERICAN LIFE, INSTITUTIONAL RACISM HAS NOT REALLY BEEN DECLARED UNCONSTITUTIONAL BY THE SUPREME COURT. MOREOVER, THE COURT HAS NOT SAID THAT THERE IS NO LEGAL RIGHT OF WHITE AMERICANS TO DISCRIMINATE AGAINST BLACK AMERICANS. THE COURT HAS AN ETHICAL RESPONSIBILITY TO TAKE THIS COURSE OF ACTION, BUT TRADITIONALLY LAW, ETHICS AND CUSTOMS HAVE BEEN USED TO DEFEND THE RIGHTS OF THE MAJORITY GROUP. THE COURT MAY BE FORCED BY THE COR-

PORATE DEMANDS OF AMERICAN SOCIETY TO DECLARE THAT THERE IS NO LEGAL RIGHT OF WHITE AMERICA TO DISCRIMINATE AGAINST BLACK AMERICA IF IT CAN BE PROVEN TO BE IN THE NATIONAL INTEREST. THIS WILL ONLY HAPPEN THROUGH A COALITION FROM THE WHITE POWER STRUCTURE AND BLACK AMERICAS MORE ADEQUATELY ASSERTING THEIR POLITICAL POWER REPRESENTING ONE FIFTH OF THE AMERICAN POPULATION.

IN ORDER TO ERADICATE RACISM FROM AMERICAN PUBLIC POLICY STUDIES OF THIS KIND MUST BE CONSTANTLY UPDATED BY PERSONS WHO ARE ENGAGED IN THE STRUGGLE FOR BLACK LIBERATION. IN ORDER TO PLAN SUCCESSFUL STRATEGIES, ONE MUST BE COGNIZANT OF THE PARTICULAR STRENGTHS, WEAKNESSES AND AVENUES OF GROWTH OF PERSONS WHO DETERMINE PUBLIC POLICY.

SINCE 1968 THERE HAVE BEEN CHANGES MADE BY THE NIXON ADMINISTRATION IN THE COMPOSITION OF THE SUPREME COURT. THE INDIVIDUAL PERSONALITIES ON THE COURT SHOULD BE ANALYZED FROM A BLACK ETHICAL PERSPECTIVE. IN ORDER TO ADEQUATELY DEAL WITH INSTITUTIONAL RACISM PERSONS ENGAGED IN THE STRUGGLE FOR BLACK LIBERATION MUST STUDY CAREFULLY THE PERSONALITIES AND ACTIONS OF THE DETERMINANTS OF PUBLIC POLICY IN THE JUDICIARY, THE PRESIDENCY AND ALSO IN THE CONGRESS. THIS STUDY WAS CONFINE TO THE SUPREME COURT BUT THE EVIDENCE IS VERY CLEAR THAT INSTITUTIONAL RACISM HAS BEEN CONDONED, PERPETUATED AND SUPPORTED BY THE ACTIONS AND INACTIONS OF THE VARIOUS BRANCHES OF THE GOVERNMENT. AS BLACK PEOPLE GAIN POWER IN AMERICA THE SOONER THE DAY WILL COME WHEN THE FAMOUS "I HAVE A DREAM" SPEECH OF DR. MARTIN LUTHER KING WILL BECOME AN AXION OF FACT INSTEAD OF A DREAM OF A FUTURE EVENT IN AMERICAN LIFE.

APPENDIX

THE TABLE WHICH HAS BEEN PLACED IN THIS SECTION OF THIS PAPER IS THE VOTING TALLY SHEET OF THE INDIVIDUAL JUSTICES OF THE SUPREME COURT FROM 1964-1968. THIS IS A GRAPHIC RECORD OF 46 SIGNIFICANT CASES DIRECTLY INVOLVING BLACK PEOPLE. THESE CASES DEALT WITH VARIOUS SUBJECTS. THEY REPRESENTED THE AREA OF EDUCATION, PUBLIC ACCOMMODATIONS, TRIALS, FREE SPEECH, VOTING, REPRESENTATION, HOUSING, JURIES AND FAMILY RELATIONS. IN EACH CASE THAT THE JUSTICES PARTICIPATED, THE CASES WERE ANALYZED TO SEE IF THE JUSTICES VOTED FAVORABLY TO BLACKS. THE JUSTICES WHO VOTED POSITIVELY FOR BLACK PEOPLE ARE NOTED ON THE CHART WITH A (T) SIGN. ON THE OTHER HAND, THOSE JUSTICES WHO VOTED IN A PARTICULAR CASE, VOTED AGAINST BLACK PEOPLE WAS NOTED ON THE CHART WITH A (-) NEGATIVE SIGN. THE BLANK SPACES INDICATE THE JUSTICES EITHER DID NOT PARTICIPATE OR WERE NOT ON THE COURT WHEN THE CASE WAS DECIDED. IN ADDITION THE NUMBERS ON THE CHART CORRESPOND TO THE LIST OF CASES.

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2. BRADLEY v SCHOOL BOARD 382 U. S. 103 (1965).
3. ROGERS V PAUL 382 U. S. 198 (1965).
4. GREEN v CO. SCHOOL BOARD 391 U. S. 430 (1965).
5. MONROE v BOARD OF COMMISSIONERS 391 U. S. 430 (1968).
6. GREENWOOD v PEACOCK 384 U. S. 808 (1966).
7. ROBINSON v FLORIDA 378 U. S. 153 (1964).
8. COUIE v COLUMBIA 378 U. S. 347 (1964).
9. BELL v MARYLAND 378 U. S. 226 (1964).
10. HAMM v ROCK HILL 379 U. S. 306 (1964).
11. HEART OF ATLANTA MOTEL v U. S. 379 241 (1964).
12. KATZENBACH v MCCLUNG 379 U. S. (1964).
13. PIERSON v RAY 386 U. S. 347 (1967).
14. U. S. v JOHNSON 390 U. S. 563 (1968).
15. GRIFFIN v MARYLAND 378 U. S. 130 (1964).
16. EVANS v NEWTON 382 U. S. 296 (1966).
17. BROWN v LOUISIANA 383 U. S. 131 (1966).
18. NAACP v ALABAMA 377 U. S. 288 (1964).
19. DOMBROWSKI v PFISTER 380 U. S. 479 (1965).
20. COL. v LOUISIANA 379 U. S. 536 (1965).
21. COL. v LOUISIANA 379 U. S. 559 (1965).
22. ADDERLY v FLORIDA 385 U. S. 39 (1966).
23. NAACP v OVERSTREET 384 U. S. 118 (1966).
24. LOVING v VIRGINIA 388 U. S. 1 (1967).
25. WALKER v BIRMINGHAM 388 U. S. 307 (1967).
26. CAMERON v JOHNSON 390 U. S. 611 (1968).
27. REITMAN v MULKEY 387 U. S. 369 (1967).
28. JONES v MAYER 392 U. S. 409 (1968).
29. SWAIN v ALABAMA 380 U. S. 202 (1965).
30. WHITUS v GEORGIA 385 U. S. 545 (1967).
31. COLEMAN v ALABAMA 389 U. S. 22 (1967).
32. U. S. v PRICE 383 U. S. 787 (1966).
33. SIMS v GEORGIA 385 U. S. 538 (1967).
34. DAVIS v NORTH CAROLINA 384 U. S. 737 (1966).
35. BUMPER v NORTH CAROLINA 391 U. S. 543 (1968).
36. DUNCAN v LOUISIANA 391 U. S. 543 (1968).
37. LEE v WASHINGTON 390 U. S. 333 (1960).
38. GEORGIA v RACHEL 384 U. S. 780 (1966).
39. HARMON v FORSSENIUS 380 U. S. 528 (1965).
40. LOUISIANA v U. S. 380 U. S. 145 (1965).
41. U. S. v MISS. 380 128 (1965).
42. SOUTH CAROLINA v KATZENBACH 383 U. S. 301 (1966).
43. HARPER v VIRGINIA BOARD OF ELECTIONS 383 U. S. 663 (1966).
44. BOND v FLOYD 385 U. S. 116 (1966).
45. LUPPER v ARKANSAS 379 U. S. 306 (1964).
46. KING v SMITH 392 U. S. 309 (1968).

TABLE 3

VOTING RECORD OF JUSTICES OF THE SUPREME COURT FROM 1964-1968 ON 46 CASES INVOLVING BLACK PEOPLE

JUSTICES	CASE NUMBERS													
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
WARREN	T	T	T	T	T	T	T	T	T	T	T	T	T	-
BLACK	T	T	T	T	T	-	T	-	-	-	T	T	T	T
DOUGLAS	T	T	T	T	T	T	T	T	T	T	T	T	T	-
CLARK	T	T	T	T	T	-	T	T	T	T	T	T	T	-
HARLAN	T	T	T	T	T	-	-	-	-	-	-	-	T	T
BRENNAN	T	T	T	T	T	-	T	T	T	T	T	T	T	-
STEWART	T	T	T	T	T	-	T	T	T	-	T	T	T	T
WHITE	T	T	T	T	T	-	T	-	T	-	T	T	T	-
FORTAS	-					T			-				T	
GOLDBERG	T	T	T	T	T		T	T	T	T	T	T		
MARSHALL														

JUSTICES	CASE NUMBERS													
	15	16	17	18	19	20	21	22	23	24	25	26	27	28
WARREN	T	T	T	T	T	T	T	T	T	T	T	-	T	T
BLACK	-	-	-	T		T	-	-	-	T	-	-	-	T
DOUGLAS	T	T	T	T	T	T	T	T	T	T	T	T	T	T
CLARK	T	T	-	T	-	T	-	-	-		-	-	-	
HARLAN	-	-	-	T	-	T	-	-	-	T	-	-	-	-
BRENNAN	T	-	T	T	T	-	T	T	T	T	T	-		T
STEWART	T	T	-	T		-	T	-	-	T	-	-	-	T
WHITE	-	T	T	T	T	T	-	-	-	T	-	-	T	-
FORTAS		T	T					T	T	T	T	T	T	T
GOLDBERG	T				T	T	T							
MARSHALL										T				

JUSTICES	CASE NUMBERS													
	29	30	31	32	33	34	35	36	37	38	39	40	41	42
WARREN	T	T	T	T	T	T	T	T	T	T	T	T	T	T
BLACK	-	T	T	T	-	T	-	T	T	-	T	T	T	-
DOUGLAS	T	T	T	T	T	T	T	T	T	T	T	T	T	T
CLARK	-	T	T	T	T	-				-	-	T	T	T
HARLAN	-	T	T	T	T	-	T	-	T	-	T	T	T	T
BRENNAN	-	T	T	T	T	T	T	T	T	T	T	T	T	T
STEWART	-	T	T	T	T	T	-	-	T	T	T	T	T	T
WHITE	-	T	T	T	T	T	T	T	T	-	T	T	T	T
FORTAS		T	T	T	T	T	T	T	T	T	T			T
GOLDBERG	T											T	T	T
MARSHALL							T	T	T					

JUSTICES	CASE NUMBERS			
	43	44	45	46
WARREN	T	T	T	T
BLACK	–	T	–	T
DOUGLAS	T	T	T	T
CLARK	T	T	T	
HARLAN	–	T	–	–
BRENNAN	T	T	T	T
STEWARD	–	T	–	T
WHITE	T	T	–	T
FORTAS	T	T	T	T
GOLDBERG	T	T	T	T
MARSHALL				T